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THE

CANADIAN LAW TIMES

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CANADIAN LAW TIMES.

JANUARY, 1888.

THE MARITIME COURT OF ONTARIO.

IN the year 1877 the Parliament of Canada established the Maritime Court of Ontario (*a*). Vice-Admiralty Courts had been in existence for many years in the Maritime Provinces and at Quebec, and the peculiar Admiralty jurisdiction exercised by them had been found so advantageous that it was deemed wise to establish a Court possessing similar jurisdiction over the inland waters of Ontario. The Vice-Admiralty Court at Quebec was established in the year 1764, and at that time the Province of Quebec included what is now the Province of Ontario, and the jurisdiction of the Vice-Admiralty Court of Quebec extended to the inland waters of Ontario, but was apparently never exercised over matters arising thereon. When the Province of Quebec was divided into Upper and Lower Canada, the jurisdiction of the Court was confined to the Province of Lower Canada.

No doubt at that period the navigation trade and commerce on these inland waters was not of sufficient magnitude or importance to call for the establishment of a Vice-Admiralty Court in Upper Canada. Since that period the shipping on these waters has increased to large proportions, and for many years the absence of a Court exercis-

(*a*) *The Maritime Jurisdiction Act, 1877*, 40 Vict. cap. 21 (D), now consolidated with amending Acts as chapter 137 of the Revised Statutes of Canada.

ing admiralty jurisdiction placed persons engaged in maritime business on the lakes at a great disadvantage as compared with American citizens engaged in similar business. At all the great American ports, Courts possessing an extensive admiralty jurisdiction were and are still in operation. Judicial power over all cases of admiralty and maritime jurisdiction was, in 1789, vested in the Courts of the United States, and ever since the District Courts have exercised an extensive jurisdiction by proceedings *in rem*, both when a right to process *in rem* is given by the general maritime law, as interpreted by the United States Courts, and also when the right arises under state legislation. This jurisdiction is much wider than that exercised even by the High Court of Admiralty in England. For instance, it embraces all contracts of affreightment, contracts for the carriage of passengers, marine insurance, and general average (*b*).

The essentially maritime character of the navigation trade and commerce of the great inland lakes was fully discussed and shown in the case of "The Genesee Chief," decided by the Supreme Court of the United States (*c*). "These lakes (it is there said) are in truth inland seas. Different states border on one side, and a foreign nation on the other. A great and growing commerce is carried on upon them, between different states and a foreign nation, which is subject to all the incidents and hazards that attend commerce on the ocean. Hostile fleets have encountered on them, and prizes have been made, and every reason which existed for the grant of admiralty jurisdiction to the general Government on the Atlantic seas, applies with equal force to the lakes."

In recent years the comparatively small vessels heretofore employed have been to a great extent replaced by ships of much larger capacity, and costing sums as high as a quarter of a million of dollars, and the prospect is that for the future large vessels will continue to be built. The

(*b*) Henry's Admiralty Jurisdiction and Procedure, 2, 3.

(*c*) 12 How R. 443; see also *American Trans. Co'y* v. *Moore*, 2 Stu. Vice-Ad. R. 329.

length of the voyages, the perils encountered, the value of the vessels and cargoes in hazard, alike show the maritime character of the navigation on these waters. It had also, before the establishment of the Maritime Court, been recognized by the adoption of the British Merchant Shipping laws, including the regulations for preventing collisions at sea, and their application to Ontario shipping almost in their entirety.

The establishment of a Maritime Court was therefore obviously a matter of public concern, and although the amount of business transacted by the Court has not been large, owing to the restricted character of its jurisdiction, yet many suits have been brought in cases, where, but for the existence of the Court, the parties aggrieved would have had no redress. Unfortunately the jurisdiction of British Vice-Admiralty Courts is cabined, cribbed, and confined within unreasonably narrow bounds, and the subjects placed within their power of adjudication have not been selected upon any broad view of the purposes for which such Courts should exist. It is proposed to examine those to some extent in detail.

JURISDICTION OF THE MARITIME COURT OF ONTARIO.

Mortgages.—By *The Maritime Court Act* (R. S. C. cap. 137, sec. 13), this Court is clothed with jurisdiction in matters both of contract and tort, arising out of, or connected with, navigation shipping, trade or commerce on the inland waters of Ontario, similar to that exercised in like matters by any existing British Vice-Admiralty Courts. Its jurisdiction over mortgages is conferred by the "Vice-Admiralty Courts Act, 1863"; 26 Vict. cap. 54, sec. 10, (8), and is confined to "*Claims in respect of any Mortgage where the ship has been sold by a decree of the Vice-Admiralty Court, and the proceeds are under its control*"(*d*). Apart from statute, mortgages are not within admiralty jurisdiction, either British or American. Prior to the "Admiralty Court Act,

(*d*) *The Neptune*, 3 Hagg. 132; Parsons on Shipping, Vol. 2, p. 189.

1861" (*e*), the jurisdiction of the High Court of Admiralty over mortgages was regulated by 3 and 4 Vict. cap. 63, sec. 3, which conferred jurisdiction over all claims and causes of action in respect of any mortgage when the ship was under arrest of the High Court, or the proceeds of the ship were paid into Court. The Act of 1863 referred to extended this jurisdiction by declaring that the "High Court of Admiralty shall have jurisdiction over any claim in respect of any mortgage duly registered according to the provisions of the Merchant Shipping Act, 1854, *whether the ship or the proceeds thereof be under arrest of the said Court or not.*" Although this extension of the jurisdiction of the High Court was effected in 1861, yet, as we have seen, the Vice-Admiralty Courts Act, 1863, in conferring jurisdiction on those Courts over mortgages, confined it to cases where the ship is under arrest, or its proceeds paid into the Registry. No suit can therefore be instituted in any Vice-Admiralty Court, or in the Maritime Court of Ontario, for the enforcement of a mortgage. The result is especially unfortunate. Neither a sale under the power contained in the mortgage, nor under a decree, or judgment of foreclosure of any Court in Ontario, passes to the purchaser a title free from all maritime liens which may have accrued against the vessel. The purchaser can satisfy himself as to the existence of prior mortgages by consulting the Registry, and protect himself accordingly, but he has no mode of ascertaining whether maritime liens exist or not. The owner may have been navigating her in American waters, and run up bills for repairs, necessaries, towage, etc., which constitute maritime liens, and are enforceable as such by proceedings *in rem* in the American Courts possessing admiralty jurisdiction. It is obvious that the mortgagee is placed in a very disadvantageous position when he attempts to realize his security in such a case. If he takes possession of the ship, and employs her, he is in the ordinary position of a mortgagee in possession, and liable to account. A sale under the power will not be suc-

(*e*) 24 Vict. cap. 10 (Imp).

cessful if there are grounds for apprehending the existence of maritime liens, respecting which the mortgagee may have no knowledge. It is hardly to be wondered at that vessel mortgages in Ontario are regarded as the most unsatisfactory kind of security. This state of things would be remedied by extending the jurisdiction of the Maritime Court in the same manner as that in which the jurisdiction of the High Court was extended by the Act of 1861, so that suits might be instituted for the enforcement of mortgages as a substantive branch of jurisdiction.

The American Courts have decided that a sale under a judgment of the Maritime Court confers a title on the purchaser, free from all prior maritime liens (*f*). This question arose at Detroit in the case of "The Trenton," (reported in 17 C. L. J. 189). The schooner Trenton was an American vessel registered at Cleveland. She was arrested under process of the Maritime Court at Toronto in a cause of wages, and sold under the judgment of that Court. Afterwards she was libelled at Detroit upon a claim for necessaries furnished at Cleveland before the sale, which claim constituted a Maritime lien under the law of Ohio. The Court (Brown, J.) held that the purchaser under the decree of the Maritime Court of Ontario had a clear and indefeasible title to the vessel, free from all prior liens and encumbrances. As pointed out in that case, no injustice is done to the lien-holders, or other creditors, as such sales are made after the advertisement and notice, and the proceeds of the vessel are applicable in payment of their claims. It is such considerations as these which no doubt led to the extension of the jurisdiction of the High Court of Admiralty over mortgages. The words of Sir William Young in "The W. E. Weir" (*g*), in reference to the restricted jurisdiction of Vice-Admiralty Courts, presently referred to, are specially applicable.

(*f*) See *Castrique* v. *Imrie*, L. R. 4 H. L. 414; *The City of Mecca*, L. R. 5 P. D. 28 at p. 32. Carver on carriage of goods by sea, p. 700.

(*g*) Young's Ad. Dec. 145.

Towage.—Another branch of Vice-Admiralty jurisdiction is "Claims in respect of towage" (*h*). That this does not include claims for damage to a ship in tow, caused by the negligence of the tug, has been decided, but the latter decisions seem to show that the High Court of Admiralty has jurisdiction in such cases by virtue of that section of the Admiralty Court Act (*i*) which declares that the High Court of Admiralty shall have jurisdiction over any claims for "*damage received by any ship.*" The Vice-Admiralty Court Act contains only the provision for jurisdiction over claims for "*damage done by any ship,*" which is also contained in the Admiralty Court Act of 1861 (*j*). The point came up expressly in the case of "The Sir S. L. Tilley" (*k*) in which E. J. Senkler, Esq., Surrogate Judge of the Maritime Court of Ontario, held that this Court had no jurisdiction in such a case. Here again there is no conceivable ground or reason for restricting the jurisdiction of this Court, as compared with that of the High Court of Admiralty. This can be amended by simply declaring that the Maritime Court of Ontario shall have jurisdiction over any claim for damage received by any ship, whether the cause of action arise from breach of contract or otherwise.

Ownership and Possession.—The Vice-Admiralty Courts have also jurisdiction over "Claims between the owners of any ship registered in the possession in which the Court is established, touching the ownership, possession, employment, or earnings of such ship." The 8th section of the Admiralty Court Act of 1861, contains the same provision, but added to it is this clause, "*and (the Court) may settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship, or any share therein to be sold, and may make such order in the premises as to it shall seem fit*"(*l*). The absence of this provision for taking accounts and directing a sale of the ship, renders it

(*h*) 26 Vict. cap. 24, sec. 10, (5) (Imp.).
(*i*) 3 & 4 Vict. cap. 63 (Imp.).
(*j*) 24 Vict. cap. 24, sec. 7 (Imp.).
(*k*) Not yet reported, but to appear in the Occasional Notes.
(*l*) 24 Vict. cap. 10, sec. 8 (Imp.).

impossible for Vice-Admiralty Courts to exercise this branch of jurisdiction in a satisfactory manner. In the "W. E. Weir" (*m*), Sir William Young observed in reference to this matter: "*This is one of the cases which has occasionally occurred in this Court (the Vice-Admiralty Court at Halifax) when its restricted power as compared with that of the High Court of Admiralty has worked injury to suitors, and made the wisdom or motive of the restriction difficult to fathom.*"

Building, Equipping, and Repairing.—By the fourth section of the Admiralty Court Act 1861, jurisdiction is conferred on the High Court over "*any claim for the building, equipping or repairing of any ship, if at the time of the institution of the cause, the ship or the proceeds thereof are under arrest of the Court*" (*n*). This provision *does not create a maritime lien* for such claims, but enables the Court to adjudicate upon them where the ship or the proceeds are already under the control of the Court. It is an obviously useful extension of the jurisdiction, and no possible reason can be assigned for with-holding similar powers from Vice-Admiralty Courts.

Charter Parties and Affreightment.—In 1868 a limited jurisdiction in admiralty was conferred on certain of the County Courts in England (*o*) and this jurisdiction was extended the following year, by "The County Courts Admiralty Jurisdiction Amendment Act, 1869" (*p*). By the latter Act, jurisdiction (limited by the amount involved) was given to these Courts over "*any claim arising out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also to any claim in tort in respect of goods carried in any ship*" (*q*). These claims are not included in the matters over which the High Court or Vice-Admiralty Courts have jurisdiction,

(*m*) Young's Ad. Dec. 145.

(*n*) *The Two Ellens*, L. R. 4 P. C. 161; *The Heinrich Bjorn*, L. R. 10 P. D. 44.

(*o*) 31-2 Vict. cap. 71 (Imp.).

(*p*) 32-3 Vict. cap. 51 (Imp.).

(*q*) *The cargo ex Argos*, L. R. 5 P. C. 134.

but they are within the Admiralty Jurisdiction of the Courts of the United States, and are obviously subjects specially fit for investigation by a Maritime Court. The statutory provision referred to *does not make these claims maritime liens*, but merely enables the Court to enforce such claims by proceedings *in rem* (*r*).

Title to Ships.—In suits in the Maritime Court, questions of title to ships must frequently arise. Vice-Admiralty Courts have no power to investigate such questions. This restriction was removed in the case of the High Court of Admiralty, and the powers granted to that Court might reasonably be extended to the Maritime Court of Ontario. The subject has been discussed by the present writer in an article in this journal (*s*).

Practice and Procedure.—There is very great room for improvement in the practice and procedure of the Maritime Court. At the time the Act establishing the Court was passed, there existed in Ontario a double system of administration of justice—the Courts of Common Law and the Court of Chancery. The rules of practice in the Maritime Court were modelled upon the general orders of the Court of Chancery, and are largely a verbatim adoption of those rules. In so far as no provision is made by the Act and rules, the "*Practice, pleading, writs and procedure in force at the time of its abolition in the instance side of the High Court of Admiralty*" (*t*) were made applicable to the Maritime Court. The decrees and orders of the Court are to have the same effect as those of the old Court of Chancery in Ontario, so that the practitioner in the Maritime Court must make himself familiar with the practice of an Ontario Court which has been abolished, and also with the practice of the High Court of Admiralty which has been transformed into the Admiralty Division of the High Court of Justice. It needs no argument to show that the rules of the Maritime Court should be assimilated as far as possible to

(*r*) *Brown* v. *Master of the Alina*, L. R. 5 Ex. D. 227; *The Rona*, L. R. 7 P. D. 247; *The Heinrich Bjorn*, L. R. 10 P. D. 44.

(*s*) 7 C. L. T. 21.

(*t*) R. S. C. cap. 137, sec. 15.

those of the High Court of Justice for Ontario, adopting, however, those provisions of the rules of the Admiralty Division and the Vice-Admiralty Courts which are especially applicable to Maritime causes; *e. g.*, those requiring preliminary acts to be filed in causes of damage from collision.

Costs.—Great and most undeserved odium was at one time thrown upon the Maritime Court by the charge that its proceedings were extravagantly expensive. As a fact they are less expensive than those in the Superior Courts of law, but the adoption of what may be called "A County Court tariff" for causes not involving more than $400, with a corresponding reduction of the Court fees (which I may add are exorbitant) is certainly desirable. The abuse of the process of the Court by the arrest of vessels for small claims for wages has disappeared since the promulgation of the rule restricting the costs in wages actions to $10 and disbursements, where the amount adjudged to the claimant is less than $100. There is a further improvement in this direction effected by chapter 75 of the Revised Statutes of Canada, sections 31-35, under which provision is made for the recovery of seamen's wages in a summary manner before Judges of the County Court, Justices of the Peace, etc., when the amount due does not exceed $200. By section 34 of the Act it is provided that no suit for the recovery of wages under $200 shall be instituted in the Maritime Court, unless the owner of the ship is insolvent, or the ship is under arrest, or sold, or the case is referred to the Court by any Judge or Magistrate, etc., or unless neither the owner nor the master is or resides within twenty miles of the place where the seaman is discharged. It is further provided by section 35 that if any suit for the recovery of a seaman's wages is instituted in the Maritime Court, and it appears that the plaintiff might have had as effectual a remedy by resorting to the summary jurisdiction given to the County Judges, etc., by the Act, the Judge shall so certify, and no costs shall be awarded to the plaintiff.

At the end of this article will be found a proposed Act

for the extension of the jurisdiction of the Court, containing the provisions I have suggested, and others which need no comment. The extension of the jurisdiction of the Maritime Court would bring to it the quantity of business necessary to make it effective, and would be of the greatest benefit to all persons engaged in navigation, trade or commerce on the inland waters of Ontario. The judicial ability and high character of the Judge and Surrogate Judges of the Court ensure its success, if the present absurd restrictions on its jurisdiction were removed; *if being a Maritime Court, it possessed to a reasonable extent jurisdiction over Maritime causes.* One advantage it possesses over any other Court, is that a case may be brought on for trial at any time and at any place, and the convenience of vessel owners and seamen duly consulted. By some it is also considered not a disadvantage, that there is only one appeal from final decisions, and that to the Supreme Court. On points of practice and interlocutory motions, it is desirable to have a right of appeal to the Judge of the Court from the decisions of the Surrogate Judges.

PROPOSED ACT

TO EXTEND THE JURISDICTION OF THE MARITIME COURT OF ONTARIO.

1. The Maritime Court of Ontario shall have jurisdiction over any claim in respect of any mortgage duly registered in the Province of Ontario, whether the ship or the proceeds thereof be under arrest of the Court or not. (24 Vict. cap. 10, sec. 11).

2. The said Court shall have jurisdiction to decide all questions as to the title to or ownership of any ship or vessel, or the proceeds thereof paid into Court, arising in any cause instituted in the said Court. (3-4 Vict. cap. 65, sec. 7, Imp.; see 7 C. L. T. 21).

3. The Maritime Court of Ontario shall have jurisdiction over any claim by a seaman of any ship, subject to the jurisdiction of the Court, for wages earned by him on board the ship, whether the same be due under a special

contract, or otherwise, and also over any claim by the master of any ship for wages earned by him on board the ship, and for disbursements made by him on account of the ship, and if any right of set off or counter claim, whether for damages, forfeiture, or otherwise, is set up, the Court may enter into and adjudicate upon all questions and settle all accounts then arising, or outstanding and unsettled between the parties to the action or proceeding, and may direct payment of any balance found to be due, and such master shall have the same rights, liens, and remedies for the recovery of his wages and disbursements, as any seaman not being a master has for the recovery of his wages; this provision, however, is subject to sections 34 and 35 of chapter 75 of the Revised Statutes of Canada. (24 Vict. cap. 10, sec. 10 (Imp.); *The Huron*, 6 C. L. T. 127; R. S. C. cap. 75 secs. 34-5; R. S. C. cap. 74, sec. 59; Merch. Shipping Act, 1854, secs. 109, 191).

4. The Maritime Court of Ontario shall have the same powers over any ship registered in Ontario, or any share therein, as are conferred upon the High Court of Chancery in England by the 62nd, 63rd, 64th, and 65th sections of the "Merchant Shipping Act, 1854." (24 Vict. cap. 10, sec. 12, Imp.).

5. The Maritime Court of Ontario shall have jurisdiction over any claim for damages received by any ship, whether the cause of action arise from breach of contract or otherwise. (3 & 4 Vict. cap. 65, sec. 6, Imp.).

6. In causes relating to the ownership, possession, employment, or earnings of any ship registered in either of the Provinces of Ontario or Quebec, or any share thereof, the Maritime Court of Ontario shall have jurisdiction to settle all accounts outstanding and unsettled between the parties in relation thereto, and may direct the said ship, or any share therein, to be sold, and may make such order in the premises as to it shall seem fit. (24 Vict. cap. 10, sec. 8, Imp.; 26 Vict. cap. 24, sec. 10, (9) Imp.; R. S. C. cap. 137, sec. 14, sub-sec. 8).

7. The Maritime Court of Ontario shall have jurisdiction over any claim arising after the passing of this Act out of any agreement made in relation to the use or hire of any ship, or in relation to the carriage of goods in any ship, and also as to any claim in tort in respect of goods carried in any ship. (32-3 Vict. cap. 51, sec. 2, Imp.).

8. The Maritime Court of Ontario shall have jurisdiction over any claims arising out of, or connected with, contracts for the carriage of passengers by water, marine insurance, and general average.

9. All decrees, judgments, and orders of the Maritime Court of Ontario, whereby any sum of money, or any costs, charges, or expenses shall be payable to any person, shall have the same effect as judgments in the High Court of Justice for Ontario for the time being, and the person or persons to whom any such moneys or costs, charges or expenses shall be payable shall be deemed judgment creditors, and the person or persons by whom the same are payable shall be deemed judgment debtors, and all powers of enforcing judgments possessed, or which may at any time hereafter be possessed by the High Court of Justice for Ontario, or any Judge thereof for the time being, with respect to matters depending in said Courts, as well against the ship and goods arrested as against the person or property of the judgment debtor, and all powers of examination and attachment possessed, or which may hereafter be possessed, by the said Court for the time being, shall be possessed by the Maritime Court of Ontario with respect to matters therein pending, and all remedies possessed by judgment creditors in the High Court of Justice for Ontario, for the time being, shall in like manner be possessed by persons to whom any moneys or costs, charges or expenses are by such decrees, judgments, or orders of the Maritime Court of Ontario, or of the Judge, or any Surrogate Judge thereof directed to be paid. (24 Vict. cap. 10, sec. 15, Imp.; R. S. C. cap. 187 sec. 16).

10. Any party aggrieved by an order, decision, or judgment of any Surrogate Judge of the Maritime Court of

Ontario, whether made *ex parte* or otherwise, may, with the permission of the said Surrogate Judge, appeal therefrom to the Judge, and any party aggrieved by an order, decision, or judgment of the Judge of the Maritime Court, whether made or pronounced in the first instance, or on appeal from a Surrogate Judge, may, with the permission of the Judge, appeal to the Supreme Court of Canada. Appeals to the Judge shall be governed by the practice, for the time being, in force in the High Court of Justice for Ontario, respecting appeals from orders of local Judges of the High Court to a Judge of said Court, and appeals to the Supreme Court of Canada shall be governed by section 19 of the Maritime Court Act. (R. S. C. cap. 137, sec. 16).

11. The jurisdiction conferred by this Act may be exercised by proceedings *in rem* or *in personam*.

R. GREGORY COX.

EDITORIAL REVIEW.

The Consolidated Rules.

The day fixed by proclamation for the coming into force of the Revised Statutes, 31st December, 1887, having arrived before the revision and consolidation of the Rules was complete, it was found necessary, on account of many statutory provisions respecting practice and procedure being repealed by the Revised Statutes, to continue them in force until the Revised Rules, which now contain these enactments, or Rules which are to take their place, could be finally passed and published. A Rule of the Supreme Court of Judicature was therefore passed and published in the newspapers continuing the existing practice until the 1st of February. In the meantime the revision of the Rules proceeds, and they will, we hope, be in the hands of the profession in time to apprise them of changes made thereby before they come into force.

We have before apprised the profession of changes recommended by the joint committee of the Law Associations. Many of those have been adopted, some with and some without modification. For the information of the profession, we now state in condensed form the changes which have been adopted, premising that any change which may be made in the sittings of the Courts, either at Osgoode Hall or upon Circuit, will probably not come into force until after the next long vacation.

All forms of action, except that commenced by writ of summons, are abolished, whether at the suit of the Crown or a subject. Hence every action is to be commenced hereafter by the issue of an ordinary writ of summons which will be endorsed for any extraordinary relief if desired, in addition to the claim for debt or damages as the

case may be. Thus, where formerly arrest would have taken place upon a writ of *capias ad respondendum*, the action will now be commenced by ordinary writ of summons, and the arrest will be made upon an order therefor to be granted in the same cases as an order for *capias* was formerly granted. Similarly with cases against absconding debtors; an ordinary writ of summons will be issued, and an attaching order may be procured under the same circumstances as a writ against an absconding debtor was formerly obtained. In replevin the writ will be endorsed to replevy the goods; and where previously a writ of replevin issued on precipe, an order to replevy will now issue, and where an order for a writ was formerly necessary, a motion for the order to replevy will now be necessary. In all these cases the form and mode of procedure will be the same down to judgment. In short, we now shall have but one form of action. These changes proceed upon the broad principle that arrest, attachment and replevin, are specific kinds of *relief or redress* to be given in an action or on an appeal to the Court, and are not to be confused or identified with the machinery for obtaining or working out the relief.

The offices remain the same, and all proceedings in an action will be taken as heretofore and carried on in the same offices as heretofore.

A somewhat important amendment has been made with respect to issues which will be found of local benefit in interpleader issues. The issue may hereafter be filed in the county in which the trial is directed to take place, and thereafter all proceedings are to be carried on in that county as if an action had been commenced there. Heretofore an interpleader issue has had no home, so to speak, and all proceedings to obtain production, etc., have had to be taken in Toronto.

In pleading, all confusion which arose from including counter-claim in defence has been removed by distinguishing clearly between them. The rules of the Judicature Act respecting demurrers, whereby a pleading demurred to could not be amended, and whereby a demurrer not set down was held to be allowed, have been supplanted by the

old practice prevalent in the Court of Chancery which allowed the party whose pleading was demurred to to amend on payment of $5 costs.

Of the several modes of providing the attendance of a party for examination for discovery only one has been retained, that by subpœna and appointment. Power is given however to make special orders for attendance to be examined. In all ordinary cases, however, the subpœna and appointment will be used.

All orders *nisi* and summonses are abolished. Every motion will be made upon notice where the opposite party is entitled to be heard. In motions to the Divisional Courts this necessitates an extended notice (seven clear days) to the opposite party before the beginning of the sittings, in order that he may have fair warning of the motion; and inasmuch as the Divisional Courts must have work to do upon the first day of the sittings, it involves the setting down of all motions before the sittings commence. The practice in the Queen's Bench and Common Pleas Divisions will therefore be assimilated to that of the Chancery Division, except that motions in all the Divisions are to be set down two days before the sittings.

Hereafter it will not be necessary to move separately against the findings of a jury and the judgment of the Judge thereupon. One motion against the judgment will be sufficient.

In order to simplify and reduce to one mode of procedure all references, the reference to arbitration, *eo nomine*, has been abolished. The same object precisely is attained by calling the arbitrator a referee. The report of the referee will be dealt with as a Master's report.

While on the subject of reports we may mention that whenever there is reference to a Local Master his report is to be filed with himself. In all other cases the report is to be filed at Toronto.

Special cases may be stated in any matter or proceeding as well as in actions. This will be found exceedingly useful in interpleader issues, which might often be argued

on admitted facts, but which heretofore have had to go to trial.

Payment into court with a defence has been simplified. The old rules were defective and the late English Rules are complex. Hence, new Rules have been drafted, under which the payment into Court is turned into a mere offer by the defendant of money in satisfaction of the plaintiff's cause or alleged cause of action without admission. The plaintiff may take the money out of Court, but if he does so he takes it in satisfaction of the very cause for which it was paid in. If he declines to take it out, it remains in Court subject to further order. The Court is thus allowed the widest latitude in dealing with cases according to their peculiar circumstances as they arise. As to the mode of paying in new rules have been drawn providing that money may be paid into Court at certain named Banks in the principal towns at which branches of the Canadian Bank of Commerce are not established.

In all cases the judgment pronounced by the Court is to be signed and entered forthwith unless otherwise ordered. Heretofore in actions tried by a Judge that was the rule; but in actions tried by a jury there was a stay unless otherwise ordered. The practice in all cases is now uniform, and instead of directing judgment, in cases tried by a jury, to be entered on the fifth day of the Divisional Court sittings, the entry of judgment will, in proper cases, be stayed until a motion against the judgment, if any, has been disposed of.

Where judgment has been signed by default execution will issue forthwith if desired, and not after the expiration of eight days as at present.

All judgments hereafter will be settled by the officer who sat in Court when judgment was delivered—to state shortly the effect of the rules. Thus, when judgment is delivered at the trial, the judgment will be settled by the Deputy Clerk, Deputy or Local Registrar, as the case may be, subject to the right of a dissatisfied party upon notice to the other to appeal to a Judgment clerk at Toronto to vary

the minutes, or if he prefer it, to appeal directly to the Judge.

All judgments are hereafter to be drawn up, and after being signed by the proper officer, are to be entered at full length in the book kept for that purpose, and delivered out to the party entitled, according to the present practice obtaining in the Chancery Division.

Appeals from a Judge in Chambers to a Divisional Court are to be on two clear days' notice, and to be set down at latest on the day before the sittings. Appeals from Masters and Referees are to be to the Court, and are to be dealt with otherwise in the same manner as appeals from Masters' reports have been dealt with.

The right to attach debts has been extended so as to enable a creditor to attach such claims and demands as he might formerly have reached by means of equitable execution.

The practice in Controverted Municipal Elections, which is at present a cumbersome one, and unnecessarily intricate, is simplified by substituting an ordinary motion commenced by notice served by leave of the Court or a Judge, for the procedure by motion for a writ.

The writs of Prohibition and Certiorari are abolished, the orders being given the same effect as the writs formerly had.

Every rule hereafter made is to be construed as intended to come into force on the seventh day after the day of its publication in the *Ontario Gazette*, unless otherwise provided in the rule. Publicity will therefore in future be secured for each rule as it is passed, and a reasonable time given for discovering it. This rule also gives the advantage, which is not an unimportant one, that one specific place is provided in which all new rules may be found.

With respect to Local Masters, their jurisdiction over proceedings in the action (such as the Master in Chambers exercises) is only to be exercised hereafter by such Masters as do not practise.

In the County Courts corresponding changes will take

place. Motions against judgments and for new trials will be made upon two clear days' notice, and the motions will be set down one clear day before the sittings.

The Index for 1887.

Some delay may occur in getting out our index for 1887. This is due to an effort to make it more useful than it has been heretofore. We propose to include in the Index-Digest of cases references to the reports in which all Canadian cases for the year may be found, as well as references to the pages at which our notes thereof appear in the *Occasional Notes*. It will contain, in addition to references to the cases noted in the *Occasional Notes*, references to all reported Canadian cases which have not been there noted. It will therefore in future be a complete index-digest of all cases reported in the Canadian Courts for the year. The Province of Quebec contributes but few cases of general importance, but it is proposed in future to select such as are of that nature, and include them in the index.

Canadian Law Times Calendar.

The publishers have at the request of numbers of subscribers compiled a calendar in the form of a blotting pad, showing on each sheet of blotting paper a calendar for the whole year, the names of the Judges of the various Courts, the various officials in Ontario, an index of all leading articles published in this journal during the past seven years, and other useful information. We do not hold ourselves responsible for the *law* as interpreted by the publishers, though we will vouch for it that they have done their best. From the nature of the publication the law must necessarily become obscure after it has been used a short time.

Ontario Legal Chart.

We have received Mr. Hardy's Legal Chart for 1888, which is an improvement on that of last year. In addition to the usual information there is added an alphabetical

list of all practising barristers and solicitors, with a reference to the place of residence of each. It is now the most useful directory of the kind which has yet been published, and has become necessary in every office.

Changes in the Law Society Curriculum.

The Benchers have requested us to give notice that the second edition of O'Sullivan's Manual of Government in Canada has been substituted for the first edition, and that Armour on Titles has been substituted for Taylor on Titles, both changes to come into effect at the May examinations.

BOOK REVIEW.

Outlines of the Law of Torts. By RICHARD RINGWOOD, Esquire., M.A., of the Middle Temple and N. E. Circuit, Barrister-at-law; late scholar at Trinity College, Dublin; author of "The Principles of Bankruptcy," editor of "The Bankruptcy Act, 1883," and lecturer on Common Law to Incorporated Law Society, London: Stevens & Haynes, 1887.

This Manual is the result of lectures delivered to the students by Mr. Ringwood, as lecturer on Common Law to the council of the Incorporated Law Society, and professes to be an outline only of the Law of Torts. Such being the case, we expect to find in a treatise of this kind those general and essential principles of the law only which are necessary to ground a student in the law, coupled with illustrations from leading and striking cases to show the practical application of the principles. This has been fairly done, consistently with the style of the book which is that of the ordinary law treatise. It is necessary to crystallize principles, to propound law by definitions, and to illustrate variously in order to instruct; and we hope to see a departure from the ordinary style of treatise, and a general adoption of that system of writing by means of rules or propositions tending towards codification which as been so successfully adopted by some writers, wherever it is practicable.

HAMILTON LAW ASSOCIATION.

Trustees' Report adopted at General Annual Meeting held 3rd January, 1888.

The Trustees beg to present their eighth annual Report, being for the year 1887.

During the year 1887, Mr. Robertson, Q. C., was elevated to the Bench, Mr. Kilvert accepted the Collectorship of Customs, while Messrs Currell and Lavery ceased to practise in this County, and have thus severed their connection with the Association.

Three new members have been added, viz., Messrs. H. S. Osler, P. M. Bankier, and Thomas Hobson, while R. A. Pringle who was said in last years Report to have ceased to practise in this County is again a member. The present membership is 70.

The Annual fees to the amount of $330 have been paid, there being only $7.50 in arrear.

The number of Volumes in the Library is 2298, of which 188 were added during the year.

The following periodicals are received:

The Law Times - - -	English.
The Solicitors' Journal -	"
Ths Albany Law Journal -	American.
The Canada Law Journal	Ontario.
The Canadian Law Times -	"

The Treasurer's report is submitted herewith, giving a detailed statement of receipts and expenditures of the liabilities and assets of the association, and the same is also in the form required by the Law Society.

The Trustees have recently purchased a number of Text Books, some of which are yet to arrive from England. In

making selections they have availed themselves of the views of the members, and they trust suggestions will continue to be made from time to time.

Of the indebtedness of the association mentioned in last years' report there is unpaid :

The temporary loan for library improvements -	$162 76
The balance of McKeown's mortgage - -	250 00
Balance owing to Mr. Papps - - - - -	135 00
	$547 76

And it is hoped that increased liberality on the part of the Law Society may enable these to be paid off at an early day, procure the reports still required to render the library reasonably complete, and leave the association in the future free to devote all its funds to the purchase of the latest text books and such reports as experience shall shew to be re-required from time to time.

A committee on legislation was appointed at the last general annual meeting of the association, and it is suggested that such committee be continued.

The subject which has chiefly occupied the attention of the profession during the past year has been the revision of the rules of practice. Owing to the action of the law associations throughout the country and more particularly of those of York, Middlesex and Wentworth there is every reason to hope that a complete fusion of the Courts with a uniform and consolidated practice may result from what at first promised to be but a collection of all known and existing rules.

The committee consisting of Messrs. Martin, Q.C., MacKelcan, Q.C., and Teetzel have given much valuable time to this question and the report of the joint committee on legislation from the County Law Associations dated 19th November, 1887, shews how fully the suggestions made by this association in the report dated 4th March, 1887, have been carried into effect.

The trustees suggest that the same committee be requested to act again and to use their best efforts to obtain

by legislation, if necessary, the reforms which this association has already expressed as desirable.

The report of the committee on legislation also bears good testimony to the value and influence of the associations throughout the country which is flattering to this, the oldest association in the Province.

The trustees have obtained from the Law Society a set of text books for the use of students which are lent on the same terms as the series at Osgoode Hall, and should be very useful. Only two students have thus far made the deposit necessary to entitle them to the use of the books.

The trustees beg to draw attention to the first annual report of Mr. Winchester, the Inspector of Libraries, a copy of so much thereof as relates to this association is laid on the table herewith.

(Signed) EDWARD MARTIN,
Vice-President.

(Signed) E. E. KITTSON,
Secretary.

Hamilton, 2nd January, 1888.

THE

CANADIAN LAW TIMES.

FEBRUARY, 1888.

FELONIOUS TAKING IN LARCENY.

ONE of the most firmly established doctrines in criminal law is that to constitute the crime of larceny there must be a *felonious taking*. This implies that at the time of the taking there must be the *animus furandi* on the part of the taker. An innocent taking, followed by a fraudulent appropriation, will not suffice. Perhaps it would be better to use the word "rightful" instead of "innocent" in this connection, in view of the case of *Reg* v. *Riley* (*a*). In that case which was tried in 1853, the prisoner had unintentionally driven off with his own flock a lamb belonging to the prosecutor. Sometime afterward he discovered his mistake, but, notwithstanding, sold the lamb with his own and appropriated the price. He was held guilty of larceny. This was on the ground that although the prisoner drove the lamb innocently in the sense that he had no guilty knowledge or intent, yet he committed a trespass in doing so, and that by the subsequent fraudulent appropriation the trespass became a felonious one. The decision did not involve the proposition that a trespass, not criminal when committed, was afterwards made so *by relation*. A doctrine so unsatisfactory was avoided by holding that the trespass was a continuing one, and was still going on at the time

(*a*) Dears. C. C. 149.

the guilty knowledge was acquired and the fraudulent intent was formed. Pollock, C.B., said, "The distinction between the cases is this: if the original possession be rightful, subsequent misappropriation does not make it a felony; but if the original possession be wrongful, though not felonious, and then a man disposes of the chattels *animo furandi*, it is larceny." Parke, B. says, "The original taking was not lawful. The prisoner being originally a trespasser, he continued a trespasser all along, just as at common law a trespass begun in one county continued in another, and, being a trespasser, the moment he took the lamb with a felonious intent, he became a thief. He at first simply commits a trespass, but as soon as he entertains a felonious intent, that becomes a *felonious* trespass."

The taking must be not only *animo furandi*, but also *invito domino*. In other words, the taking must amount to a trespass, or there can be no larceny. Of course in the vast majority of cases, no doubt arises as to the goods being taken *invito domino*. Yet it is this element of the crime which has given rise to most remarkable conflict of judicial opinion in cases where the chattels alleged to have been stolen have, under some mistake, been delivered to the accused by the owner with intent to pass the property.

A curious case of this kind, and one of the most interesting criminal cases tried in England of recent years, is *Reg.* v. *Ashwell* (*b*), tried in 1885 at the Leicester Assizes. The prisoner and the prosecutor met on an evening in January at a public house. About 8 p.m. the prisoner asked the prosecutor to go into the yard, and when there, requested the prosecutor to lend him a shilling, saying that he had money to draw on the following day, and that he would then repay him. The prosecutor consented, put his hand in his pocket and took out and handed to the prisoner a coin which both of them in the dark believed to be a shilling, but which the prisoner an hour afterwards discovered to be a sovereign. It was shewn and found by

(*b*) 16 Q. B. D. 190.

the jury that, on making this discovery, the prisoner could easily have restored the coin to the owner who, he knew, had not intended to part with the possession of a sovereign, but only of a shilling; but instead of doing so, he fraudulently appropriated it to his own use, obtained change for it at another public house, and on the next day denied to the prosecutor having received it. The prisoner was convicted of larceny. On a case reserved for the Court of Criminal Appeal, seven of the fourteen judges were of opinion that the prisoner was guilty of larceny at common law, the other seven thought not. The conviction therefore stood.

The main grounds of this decision were briefly these, that delivery and receipt of a chattel are not merely physical acts but involve the consent of the mind; that consent involves knowledge of the thing consented to; that the handing over by one man to another, and the receiving by the latter of a chattel which both of them believe and intend to be something else, is not a delivery and receipt at all; that the prisoner in point of law received the sovereign at the moment he first discovered it to be a sovereign; it was then that his possession of it commenced; it was then that he first *took* it; and that, as he at that moment fraudulently appropriated it, there was then the felonious taking *animo furandi* and *invito domino* necessary to answer all the requirements of larceny. Mr. Justice Denman was of opinion that the case came within the principles laid down by the authorities in respect to the *finding* of lost chattels, such as *Reg.* v. *Thurborn* (*c*), *Reg.* v. *Preston* (*d*), *Reg.* v. *Moore* (*e*), *Reg.* v. *Glyde* (*f*).

Mr. Justice Smith on the other hand considered that the only finding that happened was the finding out of a mistake which was not a chattel, and that the real chattel (the coin) was not *found*, for the simple reason that it was never *lost*.

(*c*) 1 Den. C. C. 387.
(*d*) 2 Den. C. C. 353.
(*e*) L. & C. 1.
(*f*) L. R. 1 C. C. 139.

The opinion of those judges who affirmed the conviction derived in their judgment much support from *Reg.* v. *Middleton* (*g*). In that case the prisoner had given notice of withdrawal of ten shillings, part of eleven shillings which he had on deposit in a post office savings bank. A warrant for the 10s. was duly issued to the prisoner, and a letter of advice sent to the post office at Notting Hill to pay the prisoner 10s. He presented the warrant to the clerk at that post office, who instead of referring to the proper letter of advice for 10s., referred by mistake to another for £8 16s. 10d., and placed that amount in coin upon the counter. The prisoner took up the money and went away. The jury found that the prisoner when he took the money knew he had no right to it, and took it *animo furandi*, and they found him guilty of larceny. On a case reserved eleven judges out of fifteen affirmed the conviction. This case, however, appears to have gone only thus far in support of the decision in *Reg.* v. *Ashwell*, that it shews that an unintentional delivery of property by the owner to another, under a mistake of fact, does not prevent the Court from holding that the person to whom the property is delivered has feloniously taken it, provided that at the time he received it he was aware of the mistake and received it *animo furandi*. At this point the case parts company with *Reg.* v. *Ashwell*, because there was on the part of the prisoner a knowledge of the mistake and the *animus furandi* at the moment when the money first came into his hands, whereas in Ashwell's case the greater part of the difficulty was caused by the absence of that important fact. It is also to be observed that in *Reg.* v. *Middleton*, although eleven out of the fifteen expressed their adherence to the proposition with which we are just now concerned, that a physical delivery of goods by the owner to another, even with the intention of passing the property, but made in consequence of a mistake, does not prevent the receipt of them from being larceny, if at the time of such delivery the person receiving them is aware of the mistake and

(*g*) L. R. 2 C. C. 38.

receives them *animo furandi*. Three of the eleven, Bovill, C.J., Kelly, C.B., and Keating, J., based their judgments solely on the ground that the clerk had no authority to pass the property in the money to anyone else than the person named in the proper advice note, and that therefore no property passed to the prisoner, there being no intent to pass it on the part of the owner or any one having authority to do so, and that the prisoner obtained possession of the property *invito domino* as well as *animo furandi*. A fourth judge, Pigott, B., founded his opinion entirely on the ground that the money was not completely placed in the prisoner's possession by the act of the clerk in putting it on the counter, and that his subsequently taking it up *animo furandi* was larceny as much as if he had taken it without the knowledge of the clerk or any intention on the part of the clerk that it should be taken. Only seven therefore out of the fifteen judges—a minority of the Court affirmed the doctrine in question.

Four cases were cited by the judges in *Reg.* v. *Ashwell*, two of which were declared to be irreconcileable with the other two. In *Rex* v. *Mucklow* (*h*), a letter containing a draft for £10 11s. 6d. had been delivered to the prisoner, but was meant for another person of the same name. The prisoner appropriated the draft and was convicted of larceny, but the conviction was quashed on the ground that the prisoner had no *animus furandi* when he first received the letter. This is treated by Cave, J., in *Reg.* v. *Ashwell* as a decision that the prisoner got possession of the draft at the time he first received the letter, and not at the time he became aware of the draft. From the meagre report of the case and the brief judgment of only three lines it seems rather difficult to tell that such was the real decision, or that it may not have been founded on some other ground. In *Reg.* v. *Davies* (*i*), the facts were similar to those in *Rex* v. *Mucklow*, which authority the Court simply followed without any discussion of the principles involved. These two

(*h*) 1 Moo. C. C. 160.
(*i*) Dears. C. C. 640.

cases are pronounced by some of the judges who took part in *Reg.* v. *Ashwell* to be utterly irreconcileable with *Cartwright* v. *Green* (*j*), and *Merry* v. *Green* (*k*). In the first of these cases a bureau was delivered to the prisoner to be repaired. In a secret drawer which was fastened there were guineas unknown to the owner. The prisoner when he received the bureau was ignorant of the presence of the guineas, but afterwards broke open the drawer and took out the guineas *animo furandi*. He was held guilty of larceny. In *Merry* v. *Green*, a bureau had been sold to the prisoner. There was a secret drawer in it containing a purse with money in it unknown to both seller and purchaser. The sale was shewn to have been of the bureau only and not of its contents. The purchaser having broken open the drawer and taken the purse and money *animo furandi* was held guilty of larceny. There is a very plain difference of fact between these two cases, and *Rex* v. *Mucklow* and *Reg.* v. *Davies*. In the last two cases the senders of the letters knew perfectly well what they contained, and intended that the drafts should pass into the possession and become the property of the persons who should receive the letters, but they did not intend that the letters should be received by the persons who did receive them, that is to say, there was no mistake about the subject matter of the delivery, but only about the identity of the person to receive it. In the other two cases, on the contrary, the owners did not intend to part with the property in question at all, and the mistake was one as to the subject matter only, and not as to the identity of the person. If this difference had been assigned by the Courts as the reason for the opposite decisions arrived at in the cases in question they might have been satisfactorily reconciled in that way. But the Courts did not base their conclusions upon this distinguishing fact, nor was it even adverted to. We are therefore warranted in concluding that it either escaped notice altogether, or was considered to form no distinction in point of law.

(*j*) 8 Ves. 405.
(*k*) 7 M. & W. 623.

Of the judgments supporting the conviction in *Reg* v. *Ashwell*, the most elaborate was that delivered by Mr. Justice Cave. His reasoning is substantially this: Ashwell had no possession of the coin until he discovered what it was, because it was then that he first consented to the possession of a sovereign, and possession cannot exist without consent, and consent cannot exist without knowledge. In order that there may be consent, a man must be under no mistake as to that to which he consents. He says, "suppose that while ignorant that the coin was a sovereign, he had given it away to a third person who had misappropriated it, could he have been made responsible to the prosecution for the return of 20s.? In my judgment, he could not. If he had parted with it innocently, while still under the impression that it was a shilling, I think he could have been made responsible for the return of a shilling, and a shilling only, since he had consented to assume the responsibility of a possession in respect of a shilling only." It has been said that the strength of a chain is measured by the strength of its weakest link. The weakest link in Mr. Justice Cave's claim of reasoning, if it may be said with the utmost respect, is the last one. On what ground could *Ashwell*, in the case he puts, have been made responsible for the return of even a shilling? To make him so would be to impose upon him a responsibility without conferring the corresponding benefit which formed the only consideration for assuming such responsibility. He did not receive a shilling. He received something by means of which he could have obtained a shilling, or a shilling's worth; but he could only do so by exchanging the sovereign, and thus assuming the responsibility for the whole of it—a thing which, according to the learned Judge's own argument, he had never agreed, and was not bound, to do. The legitimate conclusion, therefore, from Mr. Justice Cave's reasoning, would appear to be that, in the case put, the prisoner would not have been liable to return even a shilling. He had no possession of a sovereign because he did not know it was a sovereign, and therefore did not consent to the possession of a sovereign.

He had no possession of a shilling, because what he received was not a shilling, and was of no value to him whatever, unless he exchanged it. But exchanging it would have made him responsible, not for a shilling, but for the whole twenty shillings. The learned Judge says, "he had consented to assume the responsibility of a possessor in respect of a shilling only." A possessor of what? Not a possessor of a sovereign, because he was ignorant that it was a sovereign. All he had consented to assume was the possession of and responsibility for a shilling, and a shilling only, not the possession of a sovereign and the responsibility for a shilling. Even if he could be supposed to have consented to the latter, the prosecutor certainly never consented to part with the possession of a sovereign, and hold the prisoner responsible for a shilling only. What the person had possession of was either a sovereign or nothing. If Mr. Justice Cave's reasoning be adopted, he had not possession of a sovereign. It follows, therefore, that he had possession of nothing, and would be liable for nothing.

On the basis of this reasoning the following case may be supposed. A creditor steps into his debtor's office and asks for payment of a debt of five dollars which is due him. The debtor hands him a bank note which both of them suppose to be a five dollar note. Immediately after leaving the office the creditor is attacked by a robber who steals from him the bank note which is afterwards discovered to have been a ten dollar note. The creditor demands payment of his debt again. He says that he never received the five dollars. He acknowledges that a bank note was handed to him, but says he never received or had possession of it, because he did not know it was a ten dollar note, and therefore did not consent to receive or have possession of it, and, possession without consent being a legal impossibility, he never received or had any possession of the note. He says that he did not receive five dollars because the note was not five dollars, and though it is true that by means of it he could have obtained five dollars, he could only have done so by exchanging it, and thus assuming the responsibility

for the whole ten dollars which he had never agreed and was not bound to do; that, in short, he has received nothing from his debtor, and his debt is still wholly unpaid. What answer would the debtor have to the demand if the reasoning in question be sound? With great deference it is submitted that there is in all this the fallacy of concluding that because there is not a *responsibility* for the *value* of the coin or note, therefore there is no *possession* of the *coin* or *note itself*.

Reg. v. *Ashwell* was not long in bearing fruit in the conviction of a prisoner for larceny in a case of *Reg.* v. *Flowers* (*l*), also tried at Leicester in the following year. Flowers was a clicker in a shoe factory at Leicester. The amount of wages due to each workman was made up and put into a small paper bag which was then sealed up, and the bags were sent to the various rooms to be distributed by the respective foremen. When any mistake occurred the workman thereby affected took his bag to Cufflin, the clerk, to have the mistake rectified. The amount of wages due to Flowers was 16s. 8d. A bag which was supposed to contain that sum was handed to him by the foreman of his room. On receiving the bag the prisoner tore the top off and put the money in his pocket remarking to a fellow-workman that he was short but would keep what he had got. On the same day he went to Cufflin and handed him the torn bag which was then empty, saying that he was 3d. short. At the same time that the prisoner was making his complaint, another clicker named Jinks also made a complaint that his amount was 5d. or 6d. short. The sealed bag which had been handed to Jinks was marked on the outside "7s. 11½d. Jinks," and he knowing that this was less than the amount due him handed his bag unopened to Cufflin in the presence of Flowers. Cufflin handed to Flowers the 3d. by which his wages were short, and along with it a bag which he believed was the prisoner's bag, but which was in fact the unopened bag containing Jinks' wages. The prisoner immediately went away. Upon coming

(*l*) L. R. 19 Q. B. D. 643.

out in company with one Hillman, who was a witness on the trial, he emptied out of the bag into his hand the money which was in it, including three or four large silver coins, and said to Hillman "the biter has got bit, he has paid me double wages," at the same time shewing him the money. He then turned around to another man and said, "Come on, we'll go and have a drink on it." It did not appear from the case how long a time elapsed between the receipt of the money by the prisoner and its subsequent fraudulent appropriation by him, but as stated in a note to the report the inference from Hillman's evidence would seem to be that it was very short. The learned recorder before whom the case was tried ruled, in deference to what he supposed to be the decision of the Court in *Reg.* v. *Ashwell*, that if the prisoner received the 7s. 11½d. innocently, but afterwards fraudulently appropriated the money to his own use, he was guilty of larceny. In answer to two questions put to them by the learned recorder, the jury found that the prisoner did not know that the bag containing the 7s. 11½d. did not belong to him at the time he received it from Cufflin, but that having received the bag and its contents innocently, he afterwards fraudulently appropriated them to his own use. Upon these findings the recorder directed a verdict of guilty to be entered and submitted for the opinion of the Court the question whether, the jury not having found affirmatively that the prisoner had the *animus furandi* at the time he received the money from Cufflin, he could be rightly convicted of larceny. The Court held that he could not, and the conviction was quashed. Lord Chief Justice Coleridge says "This is a case which might have raised a difficult and subtle question, but from the mode in which it has been stated by the learned recorder there appears to be a clear distinction between it and *Reg. v. Ashwell.* In that case the Judges who were in favour of upholding the conviction did not intend to question the ancient doctrine that an innocent receipt of a chattel, and its subsequent fraudulent appropriation do not constitute larceny. On the contrary it will be seen from the judgment of *one* of the Judges in that case that he expressly accepts that rule of law. In

the present case the learned recorder directed the jury that, if the prisoner innocently received the money and afterwards fraudulently appropriated it, he was guilty of larceny. It was not our intention in *Reg.* v. *Ashwell* to enunciate any such rule, and the law has been incorrectly laid down to the jury by the learned recorder; they may have thought consistently with his direction that a fraudulent appropriation six months after the original receipt would be sufficient to warrant them in convicting the prisoner of larceny." Even if they had so thought, it is not very easy to see what difference that could have made, as they knew that in the case before them the interval instead of being six months was only a few minutes, nor does it very clearly appear how the length of the interval could *per se* affect the principle. The important question seems to be whether it was correct to say that an innocent (by which is meant rightful) receipt followed by a fraudulent appropriation at any interval, long or short, could be larceny. In charging the jury that it could, the learned recorder no doubt erred. But it is tolerably clear that this error could have produced no effect whatever on the findings of the jury. They found that when Flowers got the bag containing the money from Cufflin, he did so innocently, and that afterwards he fraudulently appropriated it. Those findings were undoubtedly correct. The jury left the Court to make such use of them as it thought fit. If the jury had also found that the fraudulent appropriation occurred at the time that Flowers made the discovery that the bag was not his (a fact which seems clear enough from the report of the case), the distinction between this case and *Reg.* v. *Ashwell* would defy detection. But the jury were not asked this question, and to this omission it would seem the prisoner must have owed his most lucky escape; although the very short judgments delivered leave one to conjecture the reason for oneself. If it were stated that for want of an express finding on this point the conviction could not be supported we could see the consistency of the decision with that of *Reg.* v. *Ashwell*, but no such statement is made, and the question submitted by the learned recorder was whether the prisoner could be

rightly convicted of larceny in the absence of a finding that he had the *animus furandi* at the time he received the money from Cufflin, meaning of course at the time Cufflin handed him the unopened bag in the factory. Now according to *Reg.* v. *Ashwell*, such a finding as that was clearly not required in order to convict the prisoner, for there was no such finding and no such fact in *Reg.* v. *Ashwell*, but exactly the contrary. The only loophole for escape which a careful study of the report seems to reveal is that as a matter of theory one might suppose the possibility that the prisoner may have made the discovery that the bag did not belong to him at some intermediate time between his receiving it and his conceiving the fraudulent design of appropriating it. In this view, and adopting the proposition of *Reg.* v. *Ashwell* that he received it only when he discovered what it was, we would have three stages in the transaction instead of two, first, the original receipt of the bag from the hand of Cufflin, second, its receipt *in law* when the discovery was made, and third, its fraudulent appropriation. The result would be that, unlike *Reg.* v. *Ashwell*, the *animus furandi* did not exist at the time of the discovery, and therefore there would be no larceny. Nothing of this kind is suggested in the report of the case, and if it was by this loophole that the prisoner escaped, it seems almost incredible that it should not have been hinted at in the judgments. On the whole the learned recorder would seem entitled to considerable sympathy. His choice lay between the belief that the seven Judges who supported Ashwell's conviction intended to depart somewhat from a rule which though ancient does not command the unanimous veneration of jurists, and which in the case of bailees is broken in upon by statute, and the belief that those learned Judges meant to hold that Ashwell did not *receive* the sovereign when it was placed in his hand by the owner and had no *possession* of it while he walked down street with it in his pocket. The choice he made was a mistaken one. No doubt he overlooked the fact that *one* of the seven Judges had expressly accepted the ancient doctrine. But, while erroneous, the choice would appear to have been rather complimentary to the learned Judges than otherwise.

It is somewhat surprising that the learned Judges who perceived such a clear distinction between the state of facts in *Reg.* v. *Flowers*, and that in *Reg.* v. *Ashwell*, should have found themselves unable to distinguish the latter from *Cartwright* v. *Green*, and *Merry* v. *Green*. In each of those cases, the subject of delivery was a bureau. There was no visible, or known, or intended delivery of anything else. Both parties were ignorant that there was any money inside the bureau at the time of delivery. It does not seem to follow, that because the purchaser got possession of the bureau, he therefore got possession of the unknown money, which happened to be in it, any more than it could be said that, because the vendor of a house delivered possession of it to the vendee, he thereby delivered possession of some chattels of his own in the attic which he had forgotten to remove, and which neither party knew to be there. In *Reg.* v. *Ashwell*, on the contrary, the delivery of a coin was just what was intended. The only thing that was not intended was that the coin should be of greater value than one shilling. In order to make *Merry* v. *Green* antagonistic to *Reg.* v. *Ashwell*, we must suppose that the plaintiff, instead of ignorantly delivering along with what he intended to deliver, another chattel of an entirely different character hidden within the former, and which he had no intention of parting with at all, had delivered a bureau of a different value from what he believed it to be. Suppose that he had contracted to sell and deliver a bureau of a certain kind of wood at a certain price, believing that one which he had was of that kind of wood, and delivered it under that belief, but afterwards discovered that it was really made of another and much more costly kind of wood, and was for that reason worth three times the contract price. Suppose, also, that the vendee sometime afterwards discovered the mistake, and then resolved to say nothing about it, and keep the bureau at the price agreed. Would it be held that until he became aware of the value of the bureau he did not receive and had not possession of it? And could he be convicted of larcency?

By the decisions above referred to, two important propositions appeared to be established, viz.:

1. The delivery of goods by the owner to another, even with the intent to pass the property in them to the latter, will not prevent the latter from being guilty of larceny, if the delivery is caused by a mistake on the part of the owner, either as to the identity of the goods or the identity of the person to whom the delivery is made, and the latter is aware of the mistake at the time he takes the goods, and takes them *animo furandi*.

2. If the owner, intending to deliver and pass the property in a chattel to another, by mistake delivers to him a chattel substantially different from that which he believes he is delivering, the person to whom such delivery is made, although, at the time of such delivery, he is free from any guilty knowledge or intent, will be guilty of larceny if he afterwards discovers the mistake and then fraudulently appropriates the chattel.

The first of these propositions is no doubt supported by the opinions of some of the Judges in *Reg.* v. *Middleton*, and by authorities therein cited. The second appears to be supported by *Reg.* v. *Ashwell* alone. That decision seems to have carried the law one step beyond any previous authority. That this should have been done, in a matter affecting the liberty of the subject, by a Court equally divided against itself, is an unsatisfactory feature of this most interesting case. That it should be possible under English law for a man to suffer punishment for a crime, when seven out of fourteen Judges—and among the seven, one of the highest authorities on criminal law in England—sitting together in the same court, hearing the same evidence, and listening to the same argument, pronounced the act done to be no crime at all, is in itself a fact not calculated to elevate the public respect for the administration of justice. And if to this it were added that the arguments by which the conclusion of the Court was reached, were such, as if employed by counsel, would merit the doubtful complaint of ingenuity, the addition

would perhaps be saved from the reproach of presumption by the remarks of Mr. Justice Mathew, when in his dissenting judgment he observed, "The highly technical reasoning upon which this conviction has been sought to be upheld should have no place in my judgment in the interpretation of the criminal law. Upon such a subject as theft, where the law is administered by magistrates as well as judges, it seems to me desirable that the rules by which guilt and innocence are to be determined, should be susceptible of ready comprehension and easy exposition."

W. A. REEVE.

EDITORIAL REVIEW.

Married Women's Property.

By slow, very slow, degrees we are advancing towards a point in the law respecting married women, which is perhaps not very far off. Hitherto we have been chasing the horizon. If laws were meant for the diversion, perplexity or profit of lawyers only, the law respecting married women's property would fulfil the purpose without much extraneous aid. If they are meant, as they really are, for the public generally, this law must be placed upon such an intelligible basis that the lay mind can compass it. By slow gradations, with the help of Equity, married women have advanced from a stage at which they could by no possibility charge themselves or their property to a stage at which they can charge their separate estate, but by such devious, or rather uncertain methods, that the law is much more easily evaded or mistaken than fulfilled or understood.

The idea of any one being able to enter into a solemn obligation, observe the necessary forms and features, and escape all responsibility, or rather never incur it, is one that cannot easily be grasped by a mind unaccustomed to a legal atmosphere. And one might with safety say it is one which the public at large will never grasp. If they ever do by possibility grasp it, they will never be satisfied with it.

The proceeding against a married woman on her contract is essentially a proceeding *in rem*, a proceeding against her property, she in the meantime furnishing the mere convenience of a party to be sued as a means to the desired end. That this principle must remain as the subtratum of the law respecting married women's property may perhaps be admitted, but it is quite unnecessary that

it should be restrained within such narrow limits as those which it now occupies. The power to contract might be freely granted to her, the means of satisfying the contract being restricted to process against her property.

At present it appears that, notwithstanding the apparently wide reading of the Act of 1884, the possession of separate estate is absolutely essential to enable her to make a contract. The words of the Act, sec. 2, s-s. 2 of the original Act are, "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, etc." Sub-section 3 is as follows :—"Every contract entered into by a married woman shall be deemed to be a contract entered into by her with respect to and to bind her separate property, unless the contrary be shown." From the second sub-section flow two consequences, 1. She may contract *respecting* her separate property, 2. She may contract *to the extent* of her separate property. From the third sub-section we deduce the following important propositions:—1. There must a be contract proved; 2. *When there is a contract proved*, it is presumed without more to have been made with respect to her separate property. When, we must therefore inquire, is a contract proved? Bearing in mind the incapacity to contract of a married woman, how far has this statute removed it? To the extent to which the statute allows her to contract, and no further, may she go. The power to contract given to a married woman under this Act is a power to contract *in respect of and to the extent of her separate property*. Beyond or without the statute she cannot contract at all (saving always those of her contracts which were enforceable in Equity). It becomes essential, therefore, that she should be possessed of separate property in order to enable her to contract. How delusive that must be to laymen is apparent. That a power to become liable or rather to make a contract, should depend upon the possession of property, and a particular kind of property, is manifestly unfair to those who cannot ascertain the capacity of the person with whom they are treating, and who, if the facts were furnished to

them, could not form a correct opinion as to her power to contract. The possession of property is usually regarded as the possession of the means of satisfying obligations, not as creating the capacity to enter into them.

The determination that there must be existing separate property at the time of the contract, was reached in *Paliser* v. *Gurney*, 19 Q. B. D. 519, without any apparent effort. It was there held that the creditor or plaintiff must show not only the formal contract, but must go further, and show that the married woman had power or capacity to contract, by showing the possession by her of separate property at the time of the contract. The whole effect, then, of the third sub-section, by which it is enacted that every contract shall be deemed to be made with respect to her separate property, is to relieve the creditor or plaintiff from proving that express reference was made to separate estate, and express intention was declared of binding it, at the time of making the contract.

The fourth section, when read with those preceding it, is somewhat misleading, and without the foregoing interpretation, might lead one to suppose that the end which we think is desirable had actually been reached, viz: that she should have unlimited power to contract, but that the obligation should be satisfied out of her separate property, present or future. This sub-section is as follows:—"Every contract entered into by a married woman, with respect to and to bind her separate property, shall bind not only the separate property which she is possessed of or entitled to at the date of the contract, but also all separate property which she may thereafter acquire." But for the narrowing influence of the preceding sub-sections, this section might well have indicated an intention to refer a contract made by a married woman generally to all property which she might possess at any time. But as the power to contract arises only when she is possessed of separate property, the power to bind after acquired separate estate is so limited as to be not only almost useless, but actually misleading. If it were intended that the creditor should be satisfied out of after acquired property, why should the power to charge

that species of property depend upon the present possession of property. What of a case where a married woman about to acquire separate estate gets credit on the faith of her expectations? What of a married woman who untruly represents that she has separate estate, and gets credit on the faith of the misrepresentation? Primarily, a person who offers to contract should be presumed to be able to contract, and the burden of proving this ought not to be laid upon the shoulders of one who has not the means of knowledge at hand.

Viewed from the standpoint uniformly taken with regard to the Married Women's Acts, we cannot look upon the decision in *Paliser* v. *Gurney* as wrong, but we think notwithstanding that case that the Act is still open to the construction, more liberal than that arrived at in the case cited, that a contract made by a married woman shall be deemed a contract made to charge separate estate, either present or future, the only contract she can make, and that the creditor should have done enough, when he has shown that the married woman has formally acted in a way in which she could not legally act unless she possessed the means which enabled her so to act. This construction would do no violence to the second sub-section, for to hold that a married woman's contract was valid with respect to after acquired property, though she possessed no present property, would be quite permissible under the words "a married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract." Then what is to be said as to torts. If a married woman is guilty of a tort, should not the injured person have compensation out of after acquired property? It is absurd to say that a married woman intends to charge her separate estate when she is guilty of a tort. And the words of the Act give no relief but in cases of contract, though they say she may be sued in tort.

If, however, the Act is not susceptible of the construction we urge, it is at least susceptible of an amendment which will certainly bear that construction, and which the demands of society require should be made.

Wager of Battle.

In "Notes of 15th century March Law" in the *Scottish Law Review* we find some interesting notes about wager of battle. It appears that all men "from Totness in England to Caithness in Scotland" were subject to the march law of crime, except four—the King of England, the King of Scotland, the Bishop of St. Andrews and the Bishop of Durham. The choice was given to one accused of theft to put himself on the country or to be tried by combat; but when a Scot was charged with a crime by a Southron, or *vice versa*, "No man could be found guilty by witness, *nisi tantummodo per probationem corporis hominis*, nor by Visnet, only by probation of the defendant's body, by wager of battle, could a conviction be obtained."

A theft of cattle had to be published by the aggrieved person within a day and night after it was committed, at Brunscaythe on the English and Rocheland on the Scottish side of the border. The claim was then prosecuted and upon denial by the accused, the combat had to take place. A space of fifteen days intervened before the combat. "If before the fifteen days were past, the defendant died, this stern code would not accept the fact as an excuse for non-compliance. No man could essoign himself by death, it said, and so the dead man's body had to be carried to the appointed place at the March on the battle day"! Fancy, if he had died twelve days before! Revivor proceedings would have been preferable.

If the plaintiff did not appear the statute said "in that clame he shall gang quite for evermair." If he were again challenged he proved the former proceedings by the oath of three barons who were present, and if the barons would not swear, the defendant had the privilege of fighting them all. If both plaintiff and defendant were present the plaintiff named the amount of damages which he claimed, and as he could only receive "two parts" of it in case of success, he took good care to name enough. The defendant had to find pledges for the full amount named. Upon giving the security he was allowed to fight. If he

could not find the security he was handed over to the plaintiffs, "to do their will upon him." If the defendant came to the conclusion although he had at first denied the charge, that the cattle had found their way into his premises, or if his conscience smote him or his pluck would not hold out, he might send word to the plaintiff that he had found that the horse was indeed the property of the plaintiff. Then, instead of going to battle he led the beast back to the march. He had next to drive it into the Esk, at a point which was then a part of the frontier line. If the animal passed the mid-stream in safety he was quit of the claim forever. But if he sank before passing the the middle the defendant had to fight.

A party might fight by attorney, so to speak, that is he might provide a substitute. But the principal had to suffer the punishment in case of defeat.

The Consolidated Rules.

The coming into force of the rules has been postponed till the 1st of March, owing to the impossibility of getting them through the press in time for the first of February, the date mentioned in our last number as fixed by the Council of Judges. No change has been made in the circuits, and the changes respecting single court do not come into force until the first of September.

The Canada Law Journal.

Our contemporary has come out this year in new form and with new vigour. We extend to it New Year greetings, and best wishes for the future.

REVIEW OF EXCHANGES.

Albany Law Journal.—30th July, 1887.

Future Damages, concluded in the following number, by GUY C. H. CORLISS. "If a thing is done," says the learned writer, "which is lawful in itself, and not actionable until damages have resulted, it is clear that the cause of action is not the doing of the thing which causes the damage, but the doing of the thing conjoined with the damage. If then the cause of action is not the doing of that thing which occasions loss, but is made up of that element and the further element of damages, and never comes into existence until the damage results, and owes its existence to such damage, how can the cause of action be more extensive or comprehensive than such damage? * * When a subsequent loss occurs it again becomes unlawful and actionable to that extent." The right to recover future damages for a permanent wrong is criticised. See the article in *American Law Register* of May, 1887, reviewed below.

Ibid.—24th September, 1887.

Common Words and Phrases. Brass knuckles; in the time of her travail; corn; cutlery; labourer; smokers' articles: subscribed; are defined.

American Law Register.—May, 1887.

Prospective Damages to Realty—Successive Actions or Single Action, by MERRITT STARR. Concluded in the following number. The article deals with the question whether a man may recover compensation for damages, which he has not suffered but is likely to suffer by reason of the acts of another. The learned writer classifies torts with the rules for damages in substance as follows:—Where there are single nuisances or acts wrongful only when causing actual damage, the rule is that damages are computed to the date of the beginning of the action. When there is a continuing nuisance or a trespass causing a continuous nuisance, the damages may be recovered in successive actions with recovery to the date of beginning each action. In trespass there is one action for all damages, past, present and prospective. Where there is a permanent tortious injury to realty other than by trespass, there is one action for all damages, past, present and prospective. The article is profuse with citations of cases, English and American.

Ibid.—July, 1887.

Colour of Title, by H. CAMPBELL BLACK. "Colour of title to land is that which in appearance has all the requisites and characteristics of title, but which, in reality, by reason of some defect, fails to convey the lawful title." *Claim* of title must not be confounded with *colour* of

title. The possession of one who has a colourable title is constructively extended to the limits mentioned in the instrument under which he claims, while that of one who holds under a mere claim is confined to that which he actually occupies. The instrument must purport to convey title in order to give colour. Numerous cases are cited.

Ibid.—August, 1887.

Constitutional Statutory Jurisdiction, by RUFUS WAPLES. A discussion as to whether Superior Courts, when exercising special statutory jurisdiction, such as attachment of property before judgment, are so fully invested with jurisdiction that errors in the proceedings do not render them void for want of jurisdiction.

Ibid.—September, 1887.

Right of Real Estate and Loan Brokers to Commissions, by W. H. THORNTON. The usual contract is that the broker will procure a purchaser, ready, able and willing to comply with the terms of the contract and consummate it. It is sufficient if the broker is the procuring cause, though he may not personally present the purchaser to his employer. If the authoriiy of the broker is ended or revoked, either expressly or by implication, he cannot recover a commission thereafter, though he may have been the means of effecting the sale. Nor is he entitled to renumeration for unsuccessful efforts unless it is expressly agreed that he shall. Double commission, that is, commission from both vendor and purchaser, can be charged, when the agent acts openly and fairly and with the full knowledge of both parties. Numerous American and some English cases are cited.

Central Law Journal.—10th June, 1887.

Citizenship and Rights Thereunder, by D. H. PINGREY. The following summary states succinctly the contents of this article:—"1. All persons are American citizens who are born, or naturalized, and subject to the jurisdiction of the United States. 2. An American citizen can abjure his country at will. 3. Members of the Indian tribes are not citizens, because they are not born under the actual and exclusive jurisdiction of the United States. 4 A citizen of the States is entitled to all the immunities and privileges of the several States. 5. A citizen of any of the States is a citizen of the United States; but a citizen of the United States may not be a citizen of any of the States. 6. Each State has the exclusive right to prescribe the qualifications of its own voters, so long as it does not discriminate on account of race, colour, or previous condition of servitude. 7. A corporation aggregate is not a citizen under the clause of the federal constitution which says, 'the citizens of each State shall be entitled to all privileges and immunities of the citizens of the several States.' The right of a corporation to do business outside of its own State is a matter of comity among the States, and can be withheld if prejudicial or opposed to public

policy. 8. The fifteenth amendment to the federal constitution does not confer the elective franchise upon any body. 9. The law imposing a tax by license upon commercial travellers is unconstitutional and void."

Ibid.—17*th June*, 1887.

Jeopardy and Malicious Prosecution, by S. S. MERRILL. One is in jeopardy when a jury is impanelled and sworn to try the accused on the charge preferred. The Court must have jurisdiction, and the indictment must be good.

Ibid.—24*th June*, 1887.

Notices of Dissolution of Partnership, by W. W. THORNTON. The subject is very thoroughly treated, and many English and American cases are cited.

Ibid.—8*th July*, 1887.

Trial by Inspection, by SEYMOUR D. THOMPSON. In modern procedure this species of trial may be had in the following cases:—In criminal trials when a female has been found guilty and pleads her pregnancy as a stay of execution. 2. When inspection becomes necessary in a civil action to determine whether an heir should be admitted. 3. In proceedings for divorce or nullity of marriage on the ground of impotency or sexual incapacity. 4. Inspection of weapons, etc., in criminal trials. 5. In cases of alleged pregnancy. Certain statutory provisions are made for view by judge or jury.

Ibid.—15*th July*, 1887.

Insurable Interests, by L. K. MIHILLS. A great number of American cases are cited. The article treats of insurable interests in property, including marine property, and life.

Ibid.—22*nd July*, 1887.

At what time does the Relation of Carrier and Passenger begin? by JOHN D. LAWSON. In a case of *Merrill* v. *Eastern R. Co.*, 139 Mass. 238, the deceased had been travelling on the engine of a passenger train, but at one of the stations got off and boarded a passenger car after the train got in motion. He fell off shortly afterwards while standing on a step, and the Court held that he was not a passenger. The learned writer refutes this decision by cases showing that the status of passenger may exist even before the commencement of the journey.

Ibid.—29*th July*, 1887.

Execution Sales of Personal Property, by VAN SYCKEL & VAN SYCKEL. A number of American cases are cited.

THE

CANADIAN LAW TIMES.

MARCH, 1888.

PARLIAMENTARY DIVORCE IN CANADA.

IN Bouvier's Law Dictionary, the word "Divorce" is defined as "the dissolution or partial suspension by law of the marriage relation. The dissolution is termed divorce from the bond of matrimony; or in the Latin form of the expression, *à vinculo matrimonii*; the suspension, divorce from bed and board, *à mensa et thoro*. The former divorce puts an end to the marriage; the latter leaves it in full force."

Divorce in England.— Prior to 1858, jurisdiction to dissolve marriage was not entrusted to any ordinary Court of Justice, but reserved to the Legislature. An attempt was made in the reign of Queen Elizabeth, by the Ecclesiastical Courts, to usurp such jurisdiction, and some decrees of divorce *à vinculo matrimonii* were pronounced, but the Star Chamber interfered and stopped the practice. The theory on which these Courts seem to have proceeded in making such decrees was, that since the Reformation marriage had ceased to be one of the Sacraments of the Church, and therefore, that the contract between the parties could be dissolved upon breach of the promise upon which the contract rested. However this may be, the Ecclesiastical Courts desisted from the exercise of this novel jurisdiction. The consequence was, that no judicial tribunal could give complete redress for the greatest matrimonial grievance, and so the practice at length sprung up

of obtaining private Acts of Parliament to release parties *à vinculo matrimonii*, and to enable them to marry again. In process of time, orders were made by Parliament to regulate the passage of such Bills, and to give to proceedings on them a judicial and inquisitorial character (*a*). The measure of relief was a costly one, available only to the wealthier members of society. Hence Parliament endeavoured to create a Court of Justice where all suitors might obtain complete redress for matrimonial wrongs, and at a cost within reach of even the humbler classes of society. The result was, the constitution in 1858, of the Court of Divorce and Matrimonial Causes. Power was given that tribunal in certain cases, and for certain specific reasons, to grant a divorce and dissolution of the marriage tie, and by the Judicature Act that jurisdiction has now become vested in the High Court of Justice, and is administered in the Probate and Divorce Division. The old Ecclesiastical jurisdiction, except in respect of marriage licenses, now vests in the above Division; therefore the jurisdiction of the Division, where established, is sole and complete in all matters relating to marriage. What those matters are, may be gathered from the Act itself. They are (i) suits for dissolution of marriage, formerly divorce *a vinculo matrimonii*; (ii) nullity of marriage; (iii) judicial separation, formerly divorce *a mensa et thoro*; (iv) restitution of conjugal rights; and (v) jactitation of marriage. The Division has also further jurisdiction, created by the above, and extended by subsequent amending Acts, in relation to other matters, arising out of the above proceedings or incidental to them. These are as follows:—(vi) Alimony in certain cases; (vii) custody of children; (viii) the application of damages recovered from an adulterer; (ix) the settlement of the property of the parties; (x) the protection of the wife's property in certain cases; and (xi) the reversal of the decree of judicial separation, and the decree *nisi* for a divorce, and a similar decree of nullity of marriage (*b*).

(*a*) *Pritchard's* Divorce Practice, 1874.

(*b*) *Dixon* on Divorce, pp. 2, 3.

The Acts apply to England exclusively; therefore the House of Lords has still jurisdiction over cases in India, Ireland, and other countries beyond the jurisdiction of the Court (*c*).

Divorce in Canada.—The English practice of legislating for each particular case was first established in Upper Canada in 1840, when a Bill was passed by the legislature for the relief of John Stuart, whose wife had eloped and committed adultery (*d*). During the next twenty-seven years, only three such divorce bills were passed by the Legislature of the Province of Canada (*e*).

In the distribution of legislative power, the British North America Act, 1867, section 91, conferred upon the Parliament of Canada exclusive legislative authority in relation to marriage and divorce. That section must be read subject to the provisions of sec. 129, whereby all laws in force in the then Provinces of Canada, Nova Scotia and New Brunswick at the Union, and all Courts of civil and criminal jurisdiction, etc., existing therein at the Union, were continued in such Provinces respectively, as if the Union had not been made; and section 146 extended the provisions of this Act to other provinces admitted to the Union.

The portions of the Dominion over which the Parliament of Canada has not assumed control in the matter of marriage and divorce are Nova Scotia, New Brunswick, Prince Edward Island and British Columbia. In these Provinces there existed at the time of the Union, Courts of divorce, and they still continue to exercise their functions. With the exception of Prince Edward Island, they appear to have been modelled after the English Court of Divorce and Matrimonial Causes, and the procedure and practice of that Court is followed as closely as circumstances will permit. In Prince Edward Island, a Court of divorce and alimony was established as far back as 1836.

(*c*) *May*, p. 767.
(*d*) 3 Vict. cap. 72.
(*e*) *Beresford*, 1853; *McLean*, 1859, and *Benning*, 1864.

Parliamentary Divorce.—There being no Divorce Court in the remainder of the Dominion, comprising Ontario, Quebec, Manitoba and the Northwest Territories, recourse for relief must be had to the Parliament of Canada. The Journals of the Legislatures of Upper Canada, the Province of Canada, and the Dominion, show repeated unsuccessful attempts to remove from the Legislature the duty of dissolving the marriage tie, but the religious views of a large portion of the legislators on the sacredness of the marriage contract have always proved an obstacle, and it is no doubt out of deference to such religious scruples that the Protestants have not pressed more urgently for the establishment of a Court.

It is rather curious that the Province of Quebec—the part of the Dominion from which comes the most vigorous opposition to divorce—should be really in advance of Ontario, Manitoba and the Northwest Territories in the matter of matrimonial relief. The Courts of that Province have long been able to grant a *separation de corps*, the equivalent of a judicial separation under the English Divorce Court practice. Again we find by Article 117 of the Civil Code, that the Courts have power to annul a marriage on the ground of impotency. "Impotency, natural or accidental, existing at the time of the marriage, renders it null; but only if such impotency be apparent and manifest. This nullity cannot be invoked by any one but the party who has contracted with the impotent person" (*f*).

There is no law which defines the ground upon which parliamentary divorces may be granted, but the impression has prevailed that while there is no limitation to the power of Parliament to grant divorces for any cause, it will not give effect to any applications except upon the ground of adultery—the sole ground recognized by the Parliament of the United Kingdom before the establishment of the Court in 1858. This has led to a circuitous method of obtaining relief in the *Stevenson* (1869) case, which was really an

(*f*) *Dorion* v. *Laurent*, 17 L. C. Jur. 324; *Lussier* v. *Archambault*, 11 L. C. Jur. 53; *Langevin* v. *Barrette*, 4 Rev. Leg. 160.

application to nullify a marriage. In that case the petitioner, when only seventeen years of age, was inveigled into the ceremony. The marriage was not consummated by cohabitation—the parties separating immediately after the marriage ceremony—yet in order to obtain relief, the old principle that the bill must directly charge adultery had to be maintained, and the woman having married again, was branded as an adulteress.

In the *Ash* and *Lavell* cases in 1887, which were really applications to nullify marriages, the former being an application to determine the validity of a foreign decree dissolving a Canadian marriage, and the latter an application to dissolve a marriage performed as a joke under false names, and of which there had been no consummation by cohabitation, the notices of application, the petitions and the preambles to the bills, while setting out these facts, and asking for relief, asked in the alternative for bills of divorce on the ground of adultery. This attempt to maintain the old principle, notwithstanding the fact that there had been no adultery, proved so shocking to the good feelings of many members of both Houses that Parliament in the exercise of its supreme and unfettered powers, eliminated from the preambles the words directly charging adultery and moulded the bills in accordance with the ascertained facts.

In both cases the idea that Parliament would only follow the practice of the English Parliament in granting bills of divorce received a wider interpretation. In the *Ash* case, the Minister of Justice, an eminent jurist, stated that he understood the principle to be that bills of divorce would be granted upon the same evidence and under the same circumstances as applications would be granted before the judicial tribunal in the mother country which has jurisdiction over such a subject.

In the debate on the *Lavell* case, Senator Gowan, also an eminent jurist, took the broader ground that Parliament is supreme in its power, the custodian of the morals and well being of society; the *maker*, not the *expounder* of the law—is, in short, the highest tribunal in the land—

the High Court of Parliament, and as such is not, and can not be bound by any rule, law or authority in the measure or extent of the relief it may grant. This view, no doubt, largely contributed to the moulding of the bills in these two cases to meet the actual facts.

The marriage ceremony, the domicil of the parties, and the *locus delicti*, or the place where the matrimonial offence for which relief is sought, was committed, are all incidents more or less material in the first instance to every application for dissolution of marriage (*h*).

By the B. N. A. Act, 1867, sec. 92, the power of making laws respecting the solemnization of marriage is conferred exclusively upon the Provincial Legislatures. In some of the Provinces of the Dominion, Justices of the Peace are, with the resident clergy of any denomination, empowered to celebrate the marriage ceremony, but as a rule the ceremony is performed by the clergy, and this while tending to throw around the marriage tie a halo of sacredness, secures a system of registration valuable as evidence, as all clergymen are required by the laws of their Provinces to make annual returns of marriages celebrated by them to the provincial authorities. In the Province of Quebec, marriages are regulated by the Civil Code of Lower Canada, but their registration is regulated by statute.

In a new country like Canada, many of its inhabitants have been married in other lands, and in respect of these Parliament must be reasonably satisfied that the law of the country where the marriage took place has been complied with.

The principal incident necessary to a valid marriage, is that the parties should be capable. All persons are competent to marry unless they labour under certain disabilities, such as being already married, or of unsoundness of mind (*i*). In England, minors or persons under 21 years of age require the consent of their fathers or guardians, but such is not the rule in Canada, as evidenced by the *Stevenson* case already referred to (*j*). The relationship of

(*h*) *Dixon*, p. 6. (*i*) *Dixon*, p. 10.
(*j*) *Regina* v. *Roblin*, 21 U. C. R. 352.

persons within the prohibited degrees of consanguinity or affinity as computed by the civil law, is also held to be a disability. In 1882, the vexed question of marriage between a man and his deceased wife's sister, both as to past and future marriages, was settled in Canada by an Act removing all restrictions (*k*). Another incident is that the marriage must be celebrated after publication of banns or upon certificate or license issued under the authority of the various Provincial Marriage License Acts.

Domicil or Jurisdiction.—In his treatise on The Law of Domicil, 1879, Prof. Dicey lays down the following general principle with respect to divorce :—

"Rule 46. Jurisdiction in matters of divorce depends in general upon the domicil of the parties to a marriage at the time of commencement of proceedings for divorce. Hence, in general,

(1). A Divorce Court of any country where such parties are then domiciled has jurisdiction to dissolve their marriage;

(2). No Court of any other country has jurisdiction to dissolve their marriage."

The nature of domicil and the manner of its ascertainment are also set forth in the following rules extracted from Prof. Dicey's work :—

"Rule 1. The domicil of any person is, in general, the place or country which is, in fact, his permanent home, but is in some cases the place or country which, whether it be in fact his home or not, is determined to be his home by a rule of law.

Rule 4. A domicil once acquired is retained until it is changed, (i) in the case of an independent person by his own act, (ii) in the case of a dependent person by the act of some one on whom he is dependent.

Rule 5. Every independent person has at any given moment either (i) the domicil received by him at (or as from) his birth, which is called the domicil of origin; or (ii) a domicil (not being the same as his domicil of origin) acquired by him while independent by his own act, which is called a domicil of choice.

(*k*) 45 Vict. cap. 42.

Rule 7. Every independent person can acquire a domicil of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*), but not otherwise.

Rule 13. The domicil of a person can always be ascertained by means of either (i) a legal presumption; or (ii) the known facts of the case.

Rule 14. A person's presence in the country is presumptive evidence of domicil.

Rule 15. When a person is known to have had a domicil in a given country, he is presumed, in the absence of proof of a change, to retain such domicil.

Rule 16. Any circumstance may be proof or evidence of domicil which is evidence either of the person's residence (*factum*) or of his intention to reside permanently (*animus manendi*) within a particular country.

Rule 19. Residence in a country is not even *prima facie* evidence of domicil when the nature of the residence is inconsistent with, or rebuts the presumption of, the existence of an intention to reside there (*animus manendi*)' (*l*).

The law of domicil, as well as the effect of a decree of a foreign Court dissolving a marriage which had taken place in Canada, was thoroughly discussed in the *Ash* case. The facts of the case were as follows:—Manton married Susan Ash in Kingston, Ontario, in 1868; she lived with him there for six weeks, and then left with his consent to visit her father in Montreal. On her return six weeks later she found his property had been sold, and he had given up housekeeping. She resided with him at his boarding house, but his intemperate habits rendered life with him intolerable, so she left him shortly afterwards, this time without his consent, and returned to her father's in Montreal, where she had since continuously resided. Manton

(*l*) *Dicey's* Law of Domicil, pp. 3, 9. The leading cases on domicil are *Brook* v. *Brook*, 9 H. L. Cas. 193; *Sottomayer* v. *De Barros*, 3 P. D. 1, 5; *Simonin* v. *Mallac*, 2 Sw. & Tr. 67; *Dalrymple* v. *Dalrymple*, 2 Hagg. C. 54; *Pitt* v. *Pitt*, 4 Macqueen H. L. Cases, 627: *Dalhousie* v. *McDonnell*, 7 C. & F. 817; *Harvie* v. *Farnie*, L. R. 8 App. Ca. 43; *Dolphin* v. *Robins*, 7 H. L. Cases 390; *Shaw* v. *Attorney-General*, L. R. 2 P. & D. 156; *Niboyet* v. *Niboyet*, 4 P. D. 1.

went to the States, and in 1874 obtained from the Court of Massachusetts a decree of divorce from Susan Ash, on the ground that she had deserted his home. There was no evidence of his residence there other than the recital in the decree, which, being put in evidence in the application to parliament, recited that for the period of five consecutive years preceding the time of his application to the Massachusetts Court, Manton had resided in Boston. On 3rd Sept., 1874, Manton married again at Stirling, Ontario, a woman named Hatch, and they removed at once to Boston, remained there living as husband and wife, and had a family. Susan Ash founded her application upon this decree of divorce, alleging that the decree being for a cause not recognized in Canada, the decree was null, and therefore the second marriage bigamous. The Minister of Justice, in a lengthy and lucid speech, expressed the opinion that Manton had no domicil in Massachusetts because the evidence in the case did not show that Manton had been there otherwise than as a citizen of Canada, prior to the date of the decree, or that he had a home there, or that he was there for anything but the temporary purpose of obtaining a divorce; while there was a presumption to the contrary from the fact of his having resided in Kingston a married man, and of his having contracted a second marriage at Stirling soon after the date of the decree. He further contended that the recital in the decree of a residence of five years was no evidence of acquisition of a domicil, because the decree itself was valueless until it had been ascertained that the Court had jurisdiction over the subject matter and the person. The mere allegation in a decree that the Court has jurisdiction is insufficient. The principles deduced from his argument and the authorities cited were:—

1. That before any foreign tribunal can alter the marriage *status* and dissolve the marriage of persons married in Canada who apply for that relief, the applicant must have been domiciled or have a *bona fide* residence in that foreign country in order to entitle the divorce to recognition in Canada.

2. That with any such decree of divorce it must also be proved that the foreign Court had jurisdiction over the subject matter and person in the case.

3. Although it is a general principle of law that the husband's domicil is also that of his wife, the wife does not forfeit the rights she has to assert against him when he is acting in violation of his marriage duties (*m*). In support of this he cited from a judgment of Mr. Justice Gwynne, "that for the purpose of instituting a suit for divorce, the wife may have a domicil separate from that of her husband" (*n*).

As the Parliament of Canada has not yet recognized the power of any Court to deal with the subject of divorce, there is nothing binding in the argument which claims, by the comity between nations, for a judgment by a foreign Court that kind of consideration and recognition by the Senate which that judgment would have before an ordinary tribunal, upon a matter the subject matter of which was common to both. The principle involved in the term comity of nations is that as the jurisdiction over the subject matter of the judgment is common to the Courts of both countries, we give it by courtesy that consideration and weight involved in regarding it as *prima facie* a correct judgment (*o*).

In the earlier case of *Harris* in 1845 (*p*), the question of domicil also came up for consideration. The facts were as follows:—The marriage took place in Canada in 1832. Petitioner was at that time residing here as an officer attached to his regiment; the act of adultery on account of which the petitioner sought a divorce was committed in Canada; the petitioner had no other domicil in Canada than such as attached to him in his military capacity; in 1841 he returned with his regiment to England, and had not since resided in Canada. Mrs. Harris had also quitted

(*m*) Common Debates, 1887, p. 1052-4.
(*n*) *Stevens* v. *Fisk*, 8 Legal News, 42.
(*o*) Senate Debates, 1887, p. 224, Senator Abbott.
(*p*) Journals, L.C., 1844-5, p. 33.

Canada for the West Indies; the Bill passed in March, 1845, during the absence of both parties from the Province, and was reserved for Her Majesty's approval. The opinion of the law officers of the Crown was that the parties were not domiciled in Canada at the time of the passing of the Act. The Bill was accordingly disallowed.

The *locus delicti*, or place where the matrimonial offence for which relief is sought was committed, appears to be of no materiality in an application for a bill of divorce. There are several instances of bills being obtained where the adultery was committed out of Canada.

Extent of Matrimonial Relief.—In the absence of any law declaring the grounds upon which matrimonial relief may be granted by Parliament, we must doubtless accept the principles already referred to as being laid down by the Minister of Justice in the *Ash* case, viz., that bills will be granted on the same evidence and under the same circumstances as applications will be granted before a judicial tribunal in the mother country which has jurisdiction over such a subject (*q*).

Assuming that this means that Parliament may grant bills of divorce upon the same grounds as the English Court, these grounds of relief may be thus briefly stated :—

1. Adultery by the wife entitles the husband to a divorce, while a wife may obtain a divorce for incestuous adultery, bigamy with adultery, rape, sodomy or bestiality, adultery and cruelty, or adultery and desertion.

2. Nullity of marriage may be obtained (a) on the ground of impotence or incapacity arising either from congenital malformation or from some defect of a permanent and incurable character; (b) on the breach of a statute directing certain forms of marriage; and (c) on the ground of bigamy, the former marriage being ground for a decree of nullity of a later one.

3. The Court has also power to grant decrees for judicial separation on the ground of adultery, unnatural practices, cruelty or desertion for two years and upwards. The effect

(q) Commons Debates 1887, p. 1061.

of the decree is to place the wife in the legal position of an unmarried woman, both as regards her husband and third parties.

In Canada, adultery by the husband or wife of the petitioner has been the most frequent ground of relief. Out of the twenty-three such Acts granted by Parliament since the Union of the Provinces in 1867, eighteen were granted on the ground of adultery; three, although charging adultery, were really acts to nullify marriages; one was for bigamy and adultery, and one for a separation equivalent to a judicial separation in England under a decree pronounced by the Divorce Court there. In the consideration of the facts connected with the applications on the ground of adultery, no distinction has been made between the husband and wife, as happens under the English Divorce Act; a petitioning wife may obtain a divorce upon the ground of the husband's adultery, as well as the petitioning husband upon the ground of the wife's adultery.

As already stated, the *Stevenson* (*r*) and *Lavell* (*s*) cases were really bills to nullify the marriages, there being evidence that the same were never consummated by cohabitation. To these may be added the *Ash* (*t*) case which was a bill to dissolve the first marriage which had been already dissolved by a decree of an American Court, Parliament declining to be bound by the action of a foreign tribunal. During the present (1888) session of Parliament, an application will be made to nullify a marriage upon the ground of impotency. This will be the first instance of the kind in the history of Canadian divorce.

The *Campbell* case (*u*) is one of the most peculiar in the history of divorce in Canada. In 1876, Robert Campbell petititoned for a bill of divorce from his wife on the ground of adultery. This was met by a counter petition from Mrs. Campbell charging him with cruelty and desertion. The Senate rejected Campbell's petition as not proved, and

(*r*) Senate Journals, 1869, pp. 78, 92, 106.
(*s*) Senate Journals, 1887.
(*t*) Senate Journals, 1887.
(*u*) Senate Journals, 1876, 1877, 1878, 1879.

postponed further consideration of the cross-petition until the following session. In 1877, no fresh evidence was adduced, but the report of the select committee of the Senate from the previous session was taken into consideration with the result that the majority of the Senate declared Campbell's charges proved. The bill was rejected in the Commons, however, on the ground that fresh notice of the application had not been given (*v*). In 1878, Mrs. Campbell prayed for leave to prosecute her cause *in forma pauperis*. This time the Senate rejected her application for want of notice. In 1879 she renewed her application *in forma pauperis* after having given due notice thereof, and she obtained a bill equivalent to a judicial separation under a decree pronounced by the English Divorce Court, with a substantial annual cash allowance for the maintenance of herself and children. Provision was also made in the Act for enforcing the payment of the allowance. The right of Parliament to grant her maintenance and the custody of the children was warmly contested in both Houses upon the ground that these being civil rights they could only be dealt with by the Provincial Legislature under the terms of the B. N. A. Act 1867, but the result of the decision of the majorities in the two Houses determined that they were incidents to marriage and divorce, and as such within the competency of Parliament (*w*).

In all cases Parliament inquires particularly of the petitioner as to the collusion or connivance to obtain a divorce, proof of which is fatal to the application. "The Ecclesiastical Courts intended by the word *collusion*, an agreement or plan between husband and wife that one of them should commit, or appear to commit, some act upon which the other could proceed to institute a suit. That is not the meaning in which the word *collusion* is used in the English Divorce Act, which contemplates an agreement between the parties as to the institution or conduct of the

(*v*) This shews that it is unsafe to assume that the Commons will always follow the practice of the Senate.

(*w*) With respect to maintenance or alimony, Wilson, C.J., held a contrary view; *McDougall* v. *Campbell*, 41 U. C. R. 352.

suit itself; for example, where the respondent in pursuance of an arrangement with the petitioner, forbears to resist a false case, etc., or in any way becomes a party to a conspiracy to obtain a decree from the Court. The House of Lords regarded collusion in the same light as a Divorce Court now does under the statute. Where the petitioner has brought about the adultery charged against the respondent by acts expressly directed to that object, where in fact he or she has procured the commission of the offence, there is *connivance*" (*x*).

Having glanced at the origin and history of Parliamentary Divorce in England and Canada, and indicated them as clearly as the crude and unsettled character of the principles upon which relief may be granted will admit, we will now proceed to briefly explain the procedure observed in relation to such applications. This is regulated by a few Rules or Orders of the House, evidently framed after those of the House of Lords, and they relate more especially to forms of procedure than to the means of determining the merits of an application. In all unprovided cases reference is had to the Rules and Decisions of the House of Lords (*y*).

Divorce bills originate in the Senate as a matter of usage, but there is no reason why they should not originate in the Commons (*z*). In dealing with matters of divorce, as has already been said, the Senate does not sit in a judicial capacity, tied down by certain laws or precedents, but it sits as a quasi-judicial and a legislative body, which has full power to act according to its own wisdom, so that its acts are not to be considered as mere forensic acts but as acts of the Legislature (*a*). This, from a professional point of view, is most unsatisfactory, as the

(*x*) *Pritchard* on Divorce, pp. 5, 6.

(*y*) Rule 84, Senate.

(*z*) Senate Debates, 1877, p. 227, Sir Alex. Campbell.

(*a*) A competent authority goes even further, and claims that Parliament in such matters is governed by no principle other than the individual opinions and judgments of the gentlemen who give their time and attention to the consideration of each particular case. Senate Debates, 1887, p. 212, Senator Scott.

practitioner is unable to advise upon given facts with reasonable confidence. Not only has he to meet the difficulty of determining each case upon its individual merits without settled precedents, but the opinions of individual members must be kept in view. The vesting of the power of dealing with these matters in a permanent or standing committee of the House composed of judicially trained minds would go far towards remedying the difficulties now in the way. If the writer be correct, this has been done in England with respect to the applications for divorce that come from the portions of the Empire not within the jurisdiction of the English Divorce Court. They are disposed of altogether by a standing committee of the House of Lords, composed of the Law Lords.

Procedure.—Proceedings in Parliament are commenced by petitions addressed to the Governor-General, the Senate and the House of Commons, which petitions must be signed by the applicant. With the exception of the address and prayer, the petition should be in substance a mere transcript of the preamble of the Bill. The preamble ought to set out with a statement of the date and place of the marriage sought to be dissolved, describing sufficiently the parties and the ceremony, if any, which may have taken place. For, if the marriage be in itself invalid, the application for divorce is superfluous. The preamble in the next place ought to state shortly in what manner and for what length of time the parties have lived together as man and wife, subsequently to marriage; also whether any, and if any, what issue has been born of the marriage. If there should have been a separation before the commission of adultery, the fact and circumstances ought also to be stated. If a deed of separation was executed on the occasion of such separation, the deed should be mentioned. The preamble proceeds in the next place to state the charge of adultery, the name of the party (if known) with whom the crime has been committed and the period when the guilty intercourse commenced. The preamble ought also to state whether the parties are still cohabiting in adultery; and it ought specially to aver that the petitioner

has had no intercourse with the guilty spouse since the discovery of infidelity. If the adultery has been committed with more than one person, the preamble ought to specify the several persons with whom the commission of the crime is intended to be proved; for adultery, not specially charged, cannot be proved. If an action at law has been resorted to by the husband against the adulterer, the facts, verdict and judgment should be stated.

There are usually three enacting clauses. The first of these enacts that the marriage is thereby dissolved, and shall be from henceforth null and void to all intents and purposes. The second clause enacts that the petitioner may at any time thereafter contract matrimony as if the dissolved marriage had not been solemnized. The effect of a divorce is that the *vinculum* is entirely broken, and the man and the wife stand in the same position as if the other were dead (*b*). The third clause enacts that the issue, if any, of such second marriage, shall have and possess the same rights in every respect as if the first marriage had never been solemnized. In a few instances further relief has been enacted, as in the *Whiteaves* case (*c*) the marriage contract was declared void. In the *Holiwell* case (*d*), the husband was barred of all claim in the estate and effects of the petitioner. In the *Riddell-Herchmer* case (*e*), the wife-petitioner was given the sole custody and control of the infant child. As has already been mentioned, the Bill in the *Campbell* case (*f*) provided for a separation, maintenance of the wife and children by the husband, the custody of the children and authority to the Court to enforce the provisions of the Act.

The Petition and Bill being prepared, and the notice being given, the former should be deposited with the Clerk of the Senate at least eight days previous to the opening of Parliament. It is usual at the same time to pay the fee

(*b*) *Edward's* Law of Husband and Wife, 1883, p. 73.
(*c*) 32 Vict. cap. 95.
(*d*) 40 Vict. cap, 89.
(*e*) 50-51 Vict. cap .131.
(*f*) 42 Vict. cap. 79.

of $200.00, to cover the expense which may be incurred by the Senate in passing the Bill. With this is also paid $10.00 or $15.00 to cover the cost of printing the Bill in English and French.

Rule 72 of the Senate requires every applicant for a Bill of Divorce to give six months notice of his intended application and to specify from whom and for what cause, by advertisement in the *Canada Gazette*, and in two newspapers published in the county where the applicant resided at the time of separation. By Rule 73, a copy of the notice as published in the *Canada Gazette* is to be served at the instance of the applicant on the person from whom the divorce is sought, if the residence can be ascertained; and proof by declaration under the Act respecting extra-judicial oaths of such service or of the attempts made to effect it to the satisfaction of the Senate, is to be adduced before the Senate on the reading of the petition.

On the presentation of the petition in the Senate, the Senator in charge must produce the proof of the service of the notice of application upon the respondent.

There are two instances in which, the respondent not being found, the House deemed substitutional service sufficient (*g*).

As to what may be sufficient substitutional service no rule has been laid down, but it is apprehended that such steps as may be directed by a Judge in a Court of Law in an ordinary action at law will under similar circumstances be recognized by the Senate in an application for a Divorce.

The evidence of service or attempts to effect the same being satisfactory, the next step is to have the petition read and received. At this stage if any proceedings at law have been taken prior to the petition, an exemplification thereof to final judgment duly certified by the proper authority is to be presented to the House, and if damages have been awarded, proof on oath must be adduced that the same

(*g*) *Martin* Case, Senate Journals, 1870, p. 79; *Ash* Case, Senate Journals, 1887, p. 30.

have been levied and retained, or an explanation given of neglect or inability to levy same under an execution.

If the committee on standing orders reports to the House that all the orders have been complied with, the Bill is presented in the House by a Senator, and submitted to its first reading.

The second reading of the Bill cannot take place until fourteen days after the first reading; and notice of such second reading is to be affixed to the doors of the Senate during the period, and a copy thereof and of the Bill, duly served upon the party from whom the Divorce is sought, and proof on oath of such service adduced at the Bar of the Senate, before proceeding to the second reading, or sufficient proof adduced of the impossibility of complying with the rule.

The copy of the notice of the second reading and of the Bill for service should each be signed by the clerk of the House. The person making the service should of course be provided with duplicates signed in the same way. As in the case of the service of the notice of the application, there are precedents for substitutional service. Where the service has been personal, the person making service gives evidence of it at the Bar of the Senate. Substitutional service is usually proved by statutory declaration.

The terms of Rule 76 being thus complied with, Rule 77 requires the petitioner to appear below the Bar of the Senate at the second reading to be examined by the Senate either generally, or as to any collusion, or connivance between the parties to obtain such separation, unless the Senate think fit to dispense therewith. Counsel usually accompanies the petitioner at this stage. The practice is to suspend this rule and instruct a select committee, which hears the evidence, to ask the necessary questions.

The Bill is then referred to a select committee of nine members, by whom the witnesses are heard on oath, the evidence taken down in writing and reported to the Senate with all vouchers adduced before the Senate; the preliminary evidence being that of the due celebration of the marriage between the parties by legitimate testimony

either by witnesses present at the marriage or by complete and satisfactory proof of the certificate of the officiating minister or authority.

Provision is made for the summoning of witnesses, and neglect or refusal to attend subjects the defaulter to the custody of the Usher of the Black Rod, as well as to the penalty of being obliged to pay all the expenses incurred.

The witnesses are examined and cross-examined, and the case made out by counsel subject to the ordinary rules of evidence.

Where the wife has no separate estate of her own, the House will order the husband to furnish means wherewith she may defend herself. In the *Campbell* case the petitioning husband was directed to pay the fees of the wife's counsel who opposed his application which fees were taxed by the chairman of the committee at $500. He was also obliged to deposit $250 towards the payment of the expenses of her witnesses. Her counsel subsequently recovered from Campbell $350, or $50 a day for seven days, for prosecuting the wife's cross petition for a judicial separation (*h*). In the *Gardner* case, the wife's counsel was allowed a retaining fee of $20, and $20 a day for each day's attendance. In the *Nicholson* case, the House directed the wife's counsel to be paid $20 the first day, and $10 each day thereafter, and $2 a day to herself for expenses in Ottawa (*i*).

The preamble is proved clause by clause. With respect to the evidence of adultery, it may be stated that whatever convinces the committee that the act has been consummated will be sufficient (*j*). Positive evidence of the fact is rarely attainable, and therefore in the great majority of cases the allegation of adultery is substantiated by circumstances from which inferences may be drawn.

(*h*) *McDougall* v. *Campbell*, 41 U. C. R. 352. [This case was reversed on appeal, but the judgment of the Court of Appeal was never reported. —Ed.]

(*i*) The *Gardiner* and *Nicholson* cases were both dropped after report by the select committee of the Senate.

(*j*) *Macqueen*, p. 535.

The petitioner is invariably examined as to collusion or connivance, either of which is sufficient, if proved, to prevent the petitioner from obtaining relief.

At the conclusion of the evidence, counsel are at liberty to address the committee. The committee then report to the Senate whether the preamble has been proved or not, and counsel are again permitted to be heard at the Bar of the House on the evidence adduced, or on the provision for the future support of the wife. With respect to the latter point there are several precedents in the old English practice, where, when the wife brought her husband a fortune, provision was made in the Bill for her future support. There has been no such precedent in Canada, except in the *Campbell* case, which was simply a case of separation.

The Bill being favourably reported on, is then read a third time and passed, and then sent down with the evidence to the Commons. Here, it goes through the ordinary procedure of a private bill, and the house may either reject or pass it. If amendments are made, these amendments must be subsequently concurred in by the Senate. On the Royal Assent being given, the Bill becomes law. It was the practice until 1879 for the Governor-General to reserve such Bills for the signification of Her Majesty's pleasure thereon, but this need not now be done, since the change in the Royal Instructions with reference to Bills (*k*).

J. A. GEMMILL.

Ottawa, 21st February, 1888.

(*k*) *Bourinot's* Parl. Pract. p. 680.

EDITORIAL REVIEW.

The Proposed Faculty of Law.

Not long ago we advocated the adoption by the Law Society of a proposal for establishing a teaching Faculty of Law at Toronto University in connection with the Law Society. We did so upon the assumption that the Law Society had either fallen into such a hopeless state of apathy, or was so divided by internal dissensions or disturbances, that there was no hope of any useful production from that quarter, or that they had concluded finally to abdicate their proper functions of instructing their student members.

The published scheme which has been reported by the joint committee of the University and the Law Society shows, however, that any hope of a useful production by the two bodies is without foundation—assuming, which we may rightly do, that the scheme is the result of the best efforts of the selected committee. We pointed out before (7 C. L. T. 246) that the functions of the two bodies are so entirely different that there should be no possibility of their clashing—the course of university study being jurisprudential and that of the Law Society practical.

Presumably, neither body is willing to abdicate any of its functions in favour of the other, and it is right that they should not. The Law Society might well, as we before pointed out, aid the University in establishing a teaching faculty while it retained its own course of instruction. But the University could not be expected either to aid the Law Society or to adopt its principles of instruction in the practice of the law.

An effort has however been made to combine the two systems of instruction, with the result that a heterogeneous scheme is produced which reminds one of the warning to

poets given by Horace in the opening lines of the *Ars Poetica*, or of Shakespeare's line (though used in a different sense) We must not make a scarecrow of the law."

The principle of the scheme produced by the committee is to instruct the student for two years at the University in civil law, constitutional law, constitutional history, and international law, during which time he must not be under articles. He is then to be instructed by the Law Society for two years in such subjects as the society may determine, and which of necessity must be confined to municipal law and practice. The defects of this scheme in this respect are almost too glaring to require to be pointed out. The student is given half a university course and half a practical course, resulting in defective education in both respects. During the latter half of his course, especially, will more mischief be done than can be remedied in years of after life. In addition to being obliged during this period to cram all the knowledge which the society now gives him either three or five years to acquire, according as he may or may not be a graduate in arts, he will be obliged by close attention to office work to acquire business habits, a general knowledge of the interior economy and administration of an office, and the practical application of the knowledge which he is thus acquiring—a manifest impossibility. In this he is in no degree aided by the previous part of the course, which is rather calculated to give him a distaste for such work. There is no blending of the two courses of instruction, if indeed blending is possible, no progression in the mode of instruction; there is merely a short course of instruction of one character, rudely broken off and followed by a short course of instruction of an entirely dissimilar character. This of itself should be sufficient to condemn the present scheme; and as it is probably the best that can be produced after an earnest effort, the whole plan of combining the functions of the two bodies had better be forever abandoned.

Apart altogether from the objections we have urged, if there is any benefit to be derived from the proposed faculty, its full usefulness is postponed for two years, inasmuch as

all articled clerks are excluded from following the university course.

As far as we can ascertain from a perusal of the report, each body is to retain and pay its own lecturers. If such be the fact there is no reason whatever why the forces should be combined. It would not entail increased cost upon either body to maintain for separate purposes the staff which would be necessary under the proposed scheme, and lengthen the course of study in each case.

While we condemn utterly the proposal in the form which it has assumed, the result is solely attributable to the illiberality or apathy of the Law Society. There are various reasons why the Society should not entangle itself with other bodies. But it cannot hope to escape the attack which is almost certain to follow the failure of this scheme, if it does not actively set about performing its proper functions, and amongst these we cannot class the hoarding of money. We have in Toronto facilities for establishing a law school which do not exist elsewhere on the continent, including a magnificent income. Of this income the students contribute between $19,000 and $20,000 annually, of which the Law Society spends in their instruction annually the munificent sum of $800! The Province of Nova Scotia with its well regulated and well officered Law School is as far ahead of Ontario in the practical education of its lawyers, as the Province of Ontario is ahead of Nova Scotia in vanity and self adulation.

REVIEW OF EXCHANGES.

Criminal Law Magazine.—May, 1887.

Privilege as to Self-Criminating Testimony, by STEWART RAPELJE. The learned writer details the cases in which the privilege may, and those in which it may not, be claimed, and at what stage of the trial. The privilege is personal to the witness, and he may waive it, but he has a right to be apprised of his privilege. The English rule is different from the American as to who shall determine the tendency to criminate. The learned writer says, "The result of a comparison of the adjudications seems to be that the preliminary question, can any answer, responsive to the question, subject the witness to a criminal prosecution? must be decided by the court and not by the witness. If the court holds the affirmative of that question, then the witness has a right to decide whether the answer he would give to the question would have such an effect." The refusal to swear is not the subject of comment. The privilege is taken away by pardon, when the offence is barred by a statute of limitations, or where a statute protects the witness.

Ibid.—July, 1887.

Appeals by Escaped Prisoners, by M. W. HOPKINS. The proposition that an escaped prisoner cannot successfully maintain an appeal is said to be well settled.

Evidence of Character in Criminal Cases, by W. F. ELLIOTT. "In strictness, character is what a person really is, and reputation is what others believe him to be. But in the law of evidence, the term 'character' is used as synonymous with the term 'reputation.'" The evidence must be of the general character and not of particular acts. The evidence must be general only as to the particular charge, and such as to make it unlikely that the accused would commit a crime of that nature. Unless the accused has adduced evidence of good character, the prosecution cannot, as a rule, give evidence of the bad character of the accused.

THE

CANADIAN LAW TIMES.

APRIL, 1888.

THE CONTRACTS AND RIGHTS OF FOREIGN CORPORATIONS.

It is interesting to consider the manner in which a foreign corporation can exercise its powers and enforce its contracts in this country, not only on account of the great increase in the volume of international business, but also because the law bearing on the subject has been considerably developed of late years. Probaby this is but another instance of cause and effect; and although many of the principles of international law are very ancient, and have been most learnedly stated and discussed, still they require to be put in a new light when the rights of the comparatively modern corporation are taken into account.

It is proposed briefly to review and consider the decisions in our own Courts on the subject. Before doing so however a few general observations may be useful.

The first question that presents itself is, how does the right of a foreign corporation to claim the protection of our Courts arise? This is answered by Field, J., in *Paul* v. *Virginia* (*a*), in the following words: "A corporation, being the mere creation of local law, can have no legal existence beyond the limits of the sovereignty where created. The recognition of its existence by foreign States

(*a*) 8 Wall. at p. 181.

and the enforcement of its contracts made there, depend purely on the comity of those States." "It is not the comity of the Courts, but the comity of nations which is administered," is the often quoted phrase from Story's Conflict of Laws (*b*).

It is therefore by invoking the principles of private international law that a foreign corporation enforces its rights in our Courts (*c*).

The status of the foreign corporation to sue in our Courts being thus established, the same question presents itself which arises in considering the contract of domestic corporations, viz: Has the charter power been duly exercised? To answer this the Court will examine the powers which have been conferred by the foreign state, and if it find that the contract sought to be enforced could not have been entered into within the State creating the corporation, it will refuse to interfere. The act must be *intra vires*. "A corporation can only be capable of doing what its charter allows" (*d*).

There are also other limitations imposed, *e.g.*: The contract must not be illegal according to our law. Every State has the right to exclude foreign corporations, and the comity may be refused by a State when repugnant to its policy or injurious to its interests (*e*).

Assuming the Act to be within the power of the foreign corporation and not illegal or otherwise excluded,—How have our own Courts recognized the rights of such a corporation to enforce its contracts? The decisions on the subject are not numerous, and the result of the earlier ones not entirely satisfactory.

The first case on the subject is the *Bank of Montreal* v. *Bethune* (*f*), where it was held that the Bank of Montreal being a foreign corporation could not maintain an action

(*b*) See *Bank of Augusta* v. *Earle*, 13 Pet. at p. 589.

(*c*) Lindley on Partnership, 4th Ed. p. 1483: Morawetz on Private Corporations, 502: Foote on Private International Jurisprudence, 72.

(*d*) *McDonald* v. *Bank of Upper Canada*, 7 U. C. R. at p. 282.

(*e*) Morawetz on Private Corporations, pp. 512 and 514.

(*f*) 4 U. C. R. 341.

on a promissory note discounted by them in the course of conducting their banking business in Upper Canada, though they could recover against the borrower for money had and received. The judgments proceeded on the grounds that the charter of the bank confined its operations to Lower Canada, and that it therefore had no authority to act as a banker here. And in discussing the law on the subject it was laid down that, while it had been decided that a foreign corporation can sue in England upon a contract made in a foreign country, still there was no authority for saying that it could contract business or make valid contracts there. The Court further pointed out that the foreign corporation could do nothing by virtue of the foreign charter of incorporation, and holding that the contract was void, it was decided that the money advanced could be recovered as the contract was not illegal.

This was followed by *Genesee Mutual Insurance Co.* v. *Westman* (*g*). This action was brought to recover an assessment due by the defendant as a member of the company. The decision was on the plaintiff's demurrer to the defendant's plea that he was a British subject residing in Canada where the promise was made, and the judgment was for the plaintiff on the demurrer, but the Judges discussed the rights of the parties generally. The plaintiff company was incorporated under the laws of the State of New York to carry on business in Genesee County, and the charter provided that it should have a lien on the property insured.

The Court decided that the charter only contemplated that the company should carry on a domestic business, as no foreign State could create a mortgage on property here, and all the other incidental powers were clearly for the benefit and protection of those residing in Genesee County.

While abstaining from actually deciding any broader question than was raised, the Court drew attention to the dangers which a foreign corporation ran in carrying on

(*g*) 8 U. C. R. 487.

business here. Referring to the earlier English decisions, Chief Justice Robinson says, at p. 492: "Where a question is made as to what contracts a foreign corporation can make in this Province, or what business it can legally contract here, the first thing to be considered is whether it can by virtue of its foreign charter enter into any contract at all or transact any business in a corporate capacity in this Province, and I do not know upon what principle or authority we can hold that it can." Again, at p. 493: "It is a little surprising how entirely silent English text writers and English cases are on the point of a competency of a foreign corporation to carry on its business in England." And, at p. 497, he says he knows of no authority of English Courts or of our own which would enable him to hold that a foreign corporation can make contracts and transact business here, even of such a description as contemplated by its charter.

The distinction is drawn between the position of a foreign company suing in our Courts for the recovery of its property or the protection of its rights and suing to enforce a contract made.

The next case is the *Union India Rubber Co.* v. *Hibbard* (*h*). The plaintiffs, incorporated under the laws of the United States, sued the defendants on the common counts for goods sold and delivered, for money due on account, etc. The defendants pleaded that the plaintiffs were a foreign corporation and could not sue in this Province. The plaintiffs demurred, and the demurrer was sustained on the ground that it was consistent with the pleadings that the account was taken of and concerning dealings within the foreign country where the right of the corporation to be a party to such dealings could not be denied. The Court referred with approval to the two earlier decisions; and at p. 83, Chief Justice Draper says: "If the plaintiffs are suing for goods bargained and sold on a contract made wholly in Upper Canada, the action might be successfully resisted. The effect would then be to enforce

(*h*) 6 C. P. 77.

the defendants to complete the contract by accepting and paying for the goods."

The decision in *Washington County Insurance Co.* v. *Henderson* (*i*), proceeds on the same ground.

It will be seen that the Court in these cases does not recognize the principle of private international law in enforcing the comity of nations, but very much questions the right of a foreign corporation to carry on any business in this Province.

These decisions have been commented on in Lindley on Partnership (*j*), where the learned author says: "Notwithstanding some Canadian decisions to the contrary, it is conceived that a foreign corporation can sue in this country on all contracts entered into with it in this country, provided such contracts are warranted by the constitution of the corporation, and are not illegal by the law of England." And he goes on to point out what we have referred to before, viz., that the English law recognizes the rights of a foreign corporation, not by reason of any virtue possessed by its foreign charter, not because a foreign state can legislate extra-territorially, but in deference to that principle of English law relating to the comity of nations.

It should be noticed that the learned author in a note to his comments cited above, agrees with the actual decisions, and his remarks therefore only apply to the general reasoning to which we have drawn attention.

In the four cases in our Courts referred to, the Judges seemed inclined to confine the effect of the American decisions as much as possible, and did not adopt the general reasoning there employed.

Owing to the interstate commerce, questions of this nature have very frequently arisen in the United States Courts, and perhaps the leading case on the subject is that decided in 1839 by the Supreme Court of the United States, viz., *Bank of Augusta* v. *Earle* (*k*), to which we find considerable deference paid in the case next referred to.

(*i*) 6 C. P. 146.
(*j*) 4 Ed. p. 1484.
(*k*) 13 Pet. 519.

The leading case in our own Courts, however, is *Howe Machine Company* v. *Walker* (*l*), where all earlier decisions are referred to and commented upon, and it is in this case that we first find our Courts applying "the law of nations" principle.

In *Howe Machine Company* v. *Walker*, the plaintiffs were a company duly incorporated under the laws of Connecticut. They sued on a note made in Ontario by the defendant, for machines sold by him as their agent. The foreign company's right therefore to enforce a contract made in this Province was directly passed upon, and though the earlier decisions are not overruled, the force of much of the reasoning contained in them is shaken.

The result of the authorities is thus summed up by Chief Justice Richards at p. 50:—"We are, according to the decisions of the Courts in England, called on by the comity of nations so far to recognize the acts of foreign States as to admit to sue in our Courts the bodies created by them, such as corporations, trustees, etc., and to enforce the contracts made with and transferred to them, if made and done according to the law of their own country." And Wilson, J., at p. 55, says: "In my opinion there is no such law that a foreign corporation cannot carry on business here and sue and be sued in respect of their contracts which are made here;" and he refers to the great embarrassment to which any other decision would lead.

The right of a foreign bank to hold personal property to enable them to carry on trade is recognized in *Commercial National Bank* v. *Corcoran* (*m*), as a natural consequence of the decision of *Howe* v. *Walker*, and in the case cited the bank was allowed to hold goods covered by warehouse receipts, and our Banking Act was held not to apply.

The most recent decision in our own Courts is *Clarke* v. *Union Fire Insurance Co.* (*n*), where a contract entered into in a foreign State by a domestic company was held to be binding, although the charter did not expressly provide for the transaction of any business out of the country.

(*l*) 35 U. C. R. 37.
(*m*) 6 O. R. 527.
(*n*) 10 P. R. 313.

The Legislature cannot confer extra-territorial rights, but if the company's dealings are not restricted to domestic trading it can carry on its business abroad.

It will also be noticed that the domestic assets of an insolvent foreign corporation can be reached for the benefit of creditors here (*o*); and although a winding-up order was set aside by the Supreme Court in *Merchant's Bank* v. *Gillespie* (*p*), still, the amendment of 47 Vict. cap. 39, sec. 1, extending the Acts to all corporations wherever incorporated, might make the present Winding-up Act apply, though the validity of this Act is doubted, so far as foreign corporations are concerned, by the Supreme Court in the case cited. In England, however, an ancillary liquidation was directed of an Australian Company (*q*), and in any event after insolvency a foreign company cannot continue its business here (*r*).

A recent English case (*s*) takes a great step in advance in dealing with foreign trading companies. In the case in question the point arose upon service of a writ of summons as to whether a foreign corporation doing business in England resided there so as to be suable as a resident. It appeared that Colt's Patent Firearms Company was an American Company, incorporated by American law, but it had a place of business in England, and *de facto* carried on business just as an English corporation might have done, though the chief place of business and the head office were in the United States. The contract in question in this action was made in England by the corporation there carrying on business; the writ was served on the manager in England. Two points were raised, 1st. Whether a foreign corporation could be sued in England. 2nd. Whether the corporation had been properly served, supposing them to be suable.

(*o*) *Re Briton Med. Life Association*, 12 O. R. 441.
(*p*) 10 S. C. R. 312.
(*q*) *Re Commercial Bank of South Australia*, L. R. 33 Ch. D. 174.
(*r*) *Douglas* v. *Atlantic Mutual Insurance Co.*, 25 Gr. 379.
(*s*) *Newby* v. *Van Oppen*, L. R. 7 Q. B. 293.

As to the first point the Court refused to stop the action at that stage, but left it to be determined later on. The second was decided for the plaintiff. Blackburn, J., said, "It was argued that the American corporation was resident in America, and must be served, if at all, as a foreigner resident out of the jurisdiction, subject to the difficulties which are pointed out in *Ingate* v. *Austrian Lloyds* (*t*). This would be so if the foreign company had merely employed an agent here who made a contract for them; but we think it is different where the foreign corporation actually has a place of business and trade in the country. This is a point of very considerable practical importance. There are already several Scotch banking corporations that have established branches in London. We see from this case that there is at least one American corporation that has set up a branch business here, and there will probably soon be more. Such a corporation does for many purposes reside both in England and in its own country. In the case of *Carron Iron Co.* v. *Maclaren* (*u*), Lord St. Leonards taking a different view of the facts from that taken by Lords Brougham and Cranworth, thought the Scotch corporation was resident in England. We think there is great good sense in what Lord St. Leonards states to be the law on his view of the facts. He says, 'If the service on the agent is right, it is because, in respect of their house of business in England, they have a domicil in England; and in respect of their manufactory in Scotland, they have a domicil there. There may be two domicils and two jurisdictions; and in this case there are, as I conceive, two domicils and a double sort of jurisdiction, one in Scotland and one in England; and for the purpose of carrying on their business, one is just as much the domicil of the corporation as the other.' The majority of the Lords took a different view of the facts, and thought that though the corporation possessed property in England, and had agents there, they did not carry on business there; but we do not find that they differed from

(*t*) 4 C. B. N. S. 704. (*u*) 5 H. L. C. at p. 459.

Lord St. Leonards' view of the law if they had agreed as to his facts, and in the present case the fact is clear that the American company are carrying on trade themselves in London, and therefore, we think, must be treated as resident there." It appears then, from the portion of the judgment which we have quoted, that a foreign company may have a residence, home or domicil in this country, while it *de facto* carries on its business here. Though the carrying on of business may be a fact only without greater significance, the deduction drawn from it is important, namely, that it is domiciled at the place where its business is being carried on. That is to say, as far as the country of its acquired domicil is concerned, the legal entity of the company is recognized—it is not merely treated as a body existing in the home of its incorporation only. Its legal existence in its adopted domicil being recognized, it seems to be brought within reach of the final deduction, that it can carry on business and make and enforce contracts at its acquired domicil. There is no objection to a foreign person coming into the country and suing or being sued on an executory contract; and once we recognize the fact and give it legal significance, that a foreign company can assert its legal existence in this country, it follows that from that moment it is upon the same plane as a foreign person, and may sue and be sued on executory contracts. This point, however, was expressly left open in *Newby* v. *Van Oppen*.

From this short review of the authorities it will be seen that a much broader view is now taken of the rights of a foreign company to enforce its contracts in this country than formerly, and, while it cannot now be doubted that such a corporation can be sued here and can sue to recover its property and maintain action based on executed considerations, still we have no direct authority for saying that it could maintain an actions for the breach of an executory contract entered into here in the ordinary course of its business, although Chief Justice Richards is inclined to think it could do so under certain circumstances (*v*).

(*v*) *Howe Machine Company* v. *Walker*, at p. 51.

It is not therefore safe to assert that foreign and domestic corporations are on the same footing in this country so far as enforcing their rights are concerned.

It is almost unnecessary to say that the rule which requires a license from the Crown to enable a corporation to hold lands applies to a foreign as well as a domestic corporation.

No conveyance of lands can be made to any corporation unless a license to take them has been so granted (*w*), and this rule applies to all corporations, whether municipal (*x*) or trading (*y*).

Hamilton. E. E. KITTSON.

(*w*) Leith's Blackstone, 2nd ed. 293.
(*x*) *Brown* v. *MacNab*, 20 Gr. 179.
(*y*) *Chaudiere Company* v. *Desbarats*, L. R. 5 P. C. 277.

EDITORIAL REVIEW.

The Proposed Faculty of Law.

Since our last number was issued the Law Society has brought about a meeting of delegates from the universities other than Toronto University for the purpose of discussing the scheme which has already been published. As might be supposed the scheme met with some severe criticism, both upon its merits—if that term can be applied to it—and from the individual point of view.

From the university point of view a very serious objection to the scheme was urged. By the present arrangement a graduate in Arts of any recognized university can, by presenting his diploma and paying the fees, enter the Law Society, and after a three years' course, be admitted and called. To accomplish this takes six years in all. Under the proposed scheme, a student who intended to adopt the profession of law would in all probability eschew the Arts course altogether, inasmuch as he could obtain a degree in Law and be called and admitted by taking the proposed course of four years. The universities would thus lose a great many students in each year, who but for the scheme would have taken a course in Arts. Toronto University would thus increase its roll very largely at the expense of other universities.

What is perhaps a more serious matter is that students at law, by abandoning altogether the Arts course, and taking what is a very imperfect course in law, would in time fill the ranks of the profession with imperfectly educated men.

Again, the two years proposed to be spent at the university would in reality be years of about seven months each, and the days, taking into account the time employed in

attending lectures, would be of but several hours duration. There would therefore be five months in each year during which the students would be unemployed, unless they voluntarily employed their time in reading. With fourteen months of study, and that period not a continuous one, can any one suppose that a student can master enough jurisprudence to be of the slightest use to him? The two years in a law office would be two continuous years of full days' work with short holidays. We may therefore compute the time required by the proposed scheme as three years and two months for turning out a student fitted for a degree in law, call to the Bar, and admission to practice as a solicitor. The present course of five years is not thought a day too long. How then could the Law Society justify the adoption of the scheme?

If the principle of this scheme is to be maintained, the other universities must necessarily join in it, or, in addition to suffering the loss of students in Arts, forever give up the idea of granting degrees in law. How Queen's University or Victoria could maintain a staff who would give their students the same advantages as those of Toronto University would enjoy, and derive any benefit from this scheme, it is difficult to see. Unless peripatetic lectureships were established, each of these universities would be obliged to employ an independent staff of lecturers, and to shorten its law course to two years, the remainder of the time being taken under the auspices of the Law Society. They are quite at liberty now to establish independent staffs if they please, and the sole result would be to oblige them to establish law lectureships in order to keep pace with Toronto University, and then to admit their students to the Law Society *ad eundem statum* with those of Toronto University after two years' attendance.

That this would be a beneficial arrangement we must emphatically deny. Toronto University has such enormous advantages that she would almost always have the preference with students; and for the comparatively small number who would probably attend the other universities, we question very much whether they would feel that the money

spent in paying lecturers would be well disposed of for the results achieved. It would be a struggle for existence against the University which has the support of the Government of the Province and very superior advantages on account of its situation in Toronto. Each university would be obliged to establish a law library, while Toronto University would be able to avail itself of that at Osgoode Hall.

This is entirely apart from the merits of the scheme as a method of educating students. As to that we can only repeat what we said in our last number; the two systems are so distinct from each other, the functions of the two bodies so dissimilar, that there is no way of amalgamating them.

We are informed that the proposed scheme met with serious objections in the committee, and is merely a compromise; the minority of the committee assenting because they deemed it of importance that a beginning at least should be made, and thought that the imperfections of the scheme would be easily remedied after it commenced to work. The objections to the scheme as it stands at present are so radical that it cannot possibly pass the Law Society. It must therefore be either entirely remodelled or abandoned altogether.

Of these two alternatives we prefer the latter. But it does not necessarily follow that a system of instruction at each university should be abandoned. It is quite competent for the Law Society to accord some advantages to the graduates in law of those universities whose *curricula* have been approved by the Law Society, or for the Law Society to undertake a portion of the examinations at the universities and thus certify as to the qualifications of the graduates—or perhaps both the *curriculum* and the graduates should be approved by the society.

What the advantages should be is perhaps the difficult question to solve. Certainly, we say, admission to practise as a solicitor should not be granted to any one who has not formed business habits and acquired some degree of facility in the application of his knowledge by a reasonably long

course under articles. It was recently made the subject of complaint in England that solicitors were over-educated theoretically and under-educated practically. It is therefore indispensable that no certificate of fitness should be granted without at least three years' actual service under articles. The only advantage that it is possible to accord is either call to the Bar, which is perhaps too great an advantage, or admission to a certain advanced standing in the Society as a student at law.

While we are quite of the opinion that the Benchers should not accept the proposed scheme, we do not for a moment counsel their unconditional rejection of it. If they are determined not to establish a proper law school themselves, we should say most certainly accept the scheme, bad as it is, and let it better itself in its working.

The attitude of the Law Society with respect to legal education is not creditable. Opinion may differ as to its ability to endow a Law School, but it could not hold its own for a day against the flood of public opinion if its financial circumstances were made known. Its position with respect to legal education would not be understood if the scheme were rejected. It would be difficult to convince the public that the Society was doing right in refusing to join in a scheme for better legal education, and at the same time taking no steps to provide the needful assistance on its own account.

It should be borne in mind that the whole system of public education is a mild system of expropriation, Toronto university and the public schools being maintained by public moneys raised by taxation, and it would be quite within the principle to include legal education and make those pay for it who ought to do so.

The York Law Association.

We publish in this issue the annual report of the County of York Law Association, for which we had not space in our last issue. The Association is in a flourishing condition, both as regards its library and its roll of membership.

Owing to the exertions of the librarian the library is kept in commendable order, and is largely preferred to the library at Osgoode Hall for quiet work. The reports are kept noted up by constantly noting at each case affected by later decisions, whether it has been followed, doubted, discussed or overruled. This is invaluable to the practitioner, who is saved hours of labour, and is perhaps very often saved from falling into error by not observing what is called to his attention by the notes. Each year there have been added to the reports those that were most required, and there is now a very fair working library in constant use.

With respect to the Association, it may be modestly said that it has made its influence felt. The proposal to take an active part in the revision of the rules originated with this Association, and, other associations combining, many useful reforms in practice and procedure resulted. From a private letter received from British Columbia, the information comes that the committee for revising the rules of procedure in that Province look forward to deriving material aid from the Consolidated Rules of Ontario, which bear on their face so many reforms due to the active exertions of the associations.

The result of the Association generally has been to revive in the members of the Bar in the County of York the independent spirit which has always characterized the Bar, but had for some time previously been slumbering. Greater interest in domestic concerns has been evinced, and the Bar, which before was an unmanageable body, can now be easily moved and general interest excited in anything touching its interests. The same influence has no doubt been felt in other counties in which associations have been formed; and it behoves those gentlemen who have not yet formed associations to be stirring.

The Library at Osgoode Hall.

A proposal has been made to remove the library to the large lecture room, the present arrangement of the books being unsatisfactory. But a more unsatisfactory feature

of the present library is the manner in which it is used. In addition to serving its proper functions, it accommodates the staff of the Law Society, it is a lounging room where idlers meet and chat over affairs generally, it provides working tables at which letters are dictated and other business is transacted, and it forms the thoroughfare between the Benchers' room and the Courts. It is the room for paying fees, for putting in students' notices, and generally for transacting all the routine business of the society. Until some effort is made to remedy these matters, there is no use in changing rooms.

We would suggest that the bookkeeping of the establishment and all the other routine business should be done in an office to be kept for that purpose only; that the rules for the observance of silence should be enforced, and that no business should be transacted there. As it is the only thoroughfare for the Benchers we cannot deprive them of the use of it for a public highway; but we would favour an arrangement which would do the greatest good to the greatest number; namely, to exchange rooms with them. Let the profession generally occupy their snug and quiet room, and we will yield to them the exclusive use of the library, subject only to a right of way for the profession to and from the inner rooms.

The Consolidated Rules.

At the time of writing the work on the Rules is far enough advanced for the Queen's Printer to have struck off an edition for the use of the members of the Local House now in session. We may therefore be assured that they will be ready for general distribution before they come into force.

While no provision has been made in the Rules for a change in the circuits, a step in that direction has been made since the completion of the revision by the selection of a joint committee of the Bench and Bar to consider a scheme for the re-arrangement. After it was understood that no change had been made, the joint committee of the Law Associations and representatives of the Bar from towns

which did not possess associations waited upon the Judges by appointment and stated their grievances, and the result was that a committee of the Judges was selected to meet a committee of the Bar and endeavour to arrive at a satisfactory arrangement.

Owing to the absence of the Chancellor in British Columbia the committee has not, at the time of writing met, but it is hoped that when it does meet a satisfactory arrangement can be made.

The vexed question of striking out jury notices is also to be dealt with by the committee.

Judicial Salaries.

From the remarks made by the Minister of Justice in Parliament in answer to a question put, we understand that a Bill will be brought in this session dealing with judicial salaries. The Minister is reported to have said that the grievances mentioned by the deputation from the law associations would be removed by the Bill.

What the exact character of the Bill will be has not yet been made known, but we may assume that it will provide for an increase, as the meagreness of the salaries was the only grievance that was mentioned by the deputation.

It is to be hoped that the measure will provide for payment of actual circuit expenses instead of the present circuit allowances. The principle of the circuit allowance is a wrong one, and has nothing to recommend it but the fact that it has been in force for so long a time. In all other cases, we believe, public officers are paid actual expenses only.

COUNTY OF YORK LAW ASSOCIATION.

The second annual meeting of the County of York Law Association was held in Convocation Hall, at Osgoode Hall, on Monday, the 6th of February, Mr. B. B. Osler, Q.C., in the chair. There was a large attendance of members.

The following report was then read to the meeting :—

GENTLEMEN :—The trustees take pleasure in reporting that the affairs of the Association are in a very satisfactory condition, that the purposes laid down in the memorandum of incorporation are being accomplished, and that the Association lends a mode of promoting the general interests of the profession, which is of singular value.

At the last annual meeting a resolution was passed directing the Board to take measures to bring about a meeting of delegates of the various County Law Associations in the Province, for the purpose of discussing matters of general interest to the profession, and immediately after the meeting correspondence was opened with the view of bringing about such a conference.

Before, however, the details of this arrangement had been completed, the draft of the proposed revised rules was laid before the committee on legislation, and this draft contained so many features requiring careful consideration that the committee on legislation of the Hamilton Law Association was invited to meet with our committee and take up the consideration of the draft rules. This joint committee met and was subsequently enlarged by inviting all the other Law Associations in the Province to send representatives to the meetings. Most of the other Associations were represented at the subsequent meetings of the committee, and ultimately a report was made setting

forth the suggestions of the committee, the details of which are without doubt well known to the members of this Association.

The result of the labours of this committee has been recognized and freely adopted by the Judges and by the Attorney-General, and the report has been recognized as fairly representing the opinions of the profession on the subject of the new rules. The trustees in giving prominence to the work of the committee desire to point out that had it not been for the existence of the Law Associations it would have been impossible to obtain any representative expression of opinion from the Bar of the Province, nor could expression have been given to an opinion from the Bar which would have carried the weight which the report of the joint committee admittedly bore.

One of the principal features proposed by the joint committee provided for fixing definitely the mode of trial before trial. On no point were opinions so strongly and vigorously expressed as upon this, and as the solution a very strong recommendation was made to take away the absolute discretion of the trial Judge.

Almost as strong was the recommendation to establish a permanent circuit list for the trial of all cases in the High Court with the necessary re-arrangement of the sittings of the Divisional Courts. While we feel gratified that the Judges have so far recognized the labours of the committee as to have adopted nearly all their suggestions, we regret that in framing the rules they have not adopted either of these recommendations which the trustees now lay before the Association for consideration.

The trustees have aided so far as they could in urging upon Parliament the important question of raising the judicial salaries which are now most inadequate, and it is earnestly to be hoped that the efforts made in this direction may meet with some measure of success.

The present efficient state of the library is due to the labours of the librarian, whose systematic plan of keeping the reports noted up has proved most valuable especially

at Nisi Prius. No book has ever been lost from the library.

The daily attendance in the library is large, and its usefulness is now well recognized. 159 volumes have been added during the year.

Two members of the Association, Mr. W. G. Falconbridge, Q.C., and Mr. Hugh MacMahon, Q.C., were promoted to the Bench during the year.

The trustees have to record with regret the death of one member during the year, Mr. G. D'Arcy Boulton, Q.C.

At the date of the last annual report the Association numbered two hundred and sixteen members. Forty-four new members have subscribed for stock during the year. One member, Mr. Allan McNab, has withdrawn from the Association.

There are now two hundred and fifty-six members of the Association.

Two further donations of portraits have been promised to the Association, one by Mr. Ritchie, Q.C., and the other by Mr. Shepley, and it is hoped that members of the Association will contribute from time to time portraits of the judiciary of the Province.

The historian of the Association hopes soon to publish his lives of the Judges.

The particulars required by the by-laws accompany this report, being

1. The names of the forty-four members admitted during the year.

2. The names of the two hundred and fifty-six members at the date of this report.

3. A list of the books contained in the library.

4. A list of books added to the library during the year.

5. A list of periodicals received during the year.

6 A detailed statement of the assets and liabilities of the Association at the date of the report and of receipts and disbursements during the year.

The treasurer's accounts have been duly audited, and the report of the auditors will be submitted to you for your approval.

A copy of the report of the inspector of county law libraries upon the library of this Association accompanies this report.

WALTER BARWICK, Treasurer.

B. B. OSLER, President.

Dec. 31st, 1887.

On the motion of Mr. Barwick, seconded by Mr. Moss, Q.C., the report was adopted.

The Auditors' Report was then read to the meeting by Mr. Nicol Kingsmill.

Statement for the Year ending 31st December, 1887.

DR.		CR.	
Due Carswell & Co., 31st Dec., '87	$691 91	Balance of Cash on hand Dec. 31st, 1886	$720 06
Reports and Statutes	361 70	Stock Subscriptions	220 00
Text Books	300 00	Annual Fees	505 00
Periodicals and Subscriptions to Gazettes and Annual Reports and Digests	139 25	Annual Grant from the Law Society	433 00
Binding	82 50	Carswell and Co., balance ac't remaining unpaid	232 61
Furniture	10 50	Interest on Bank Deposits for 1886	39 20
Salaries, Printing, Expenses, etc	476 28		
Balance on hand, exclusive of $7.90 interest, 1887	87 73		
	$2,149 87		$2,149 87

Statement of Assets and Liabilities on the 31st December, 1887.

ASSETS.		LIABILITIES.	
Reports and Statutes	$2,760 06	Stockholders	$1,305 00
Text Books	984 77	Carswell & Co	232 61
Periodicals	238 75	Profit and Loss Account	2,589 85
Furniture	55 55		
Cash in Bank, exclusive of $7.90 interest for 1887	87 73		
	$4,127 46		$4,127 46

Profit and Loss Account—1887.

DR.		CR.	
Expenses	$476 28	Balance, 31st December, 1886	$2,088 93
Balance	2,589 85	Annual Fees	505 00
		Law Society	433 00
		Interest	39 20
	$3,066 13		$3,066 13
		Balance	$2,589 85

Toronto, December 31st, 1887.

WALTER BARWICK,
Treasurer.

The undersigned beg to report that they have examined the books, accounts and vouchers of the Treasurer and find the above report correct.

NICOL KINGSMILL,
N. GORDON BIGELOW, } *Auditors.*

On motion of Mr. Kingsmill, seconded by Mr. John Hoskin, Q.C., the report was adopted.

On the motion of Mr. Barwick, seconded by Mr. Ritchie, Q.C., the following amendment to the thirty-fourth by-law was adopted: "The payment by a barrister or solicitor subscribing for a share in the Association shall cover his annual fees for the current year."

On the motion of Mr. Marsh, seconded by Mr. John Hoskin, Q.C., the following resolution was adopted: "That the joint committee on legislation be requested to interview the Judges and the Attorney-General, and if necessary to urge upon the Legislature, the necessity for embodying in the statutes the recommendations in the following paragraphs in the report of the joint committee on legislation: 'The creation of a permanent circuit list for the trial of all actions in the High Court, and the necessary re-arrangement of the sittings of the Divisional Courts.'

"That some means should be devised to settle definitely before a case is called for trial whether it is to be tried with or without a jury."

Mr. C. H. Ritchie, Q.C., moved, seconded by Mr. J. K. Kerr, Q.C., "That a committee on legislation be appointed by this Association for the ensuing year, whose duty it shall be to consider from time to time what changes in or amendments of the laws, rules of Court or practice may in their opinion be desirable, and to submit their views thereon in the proper quarters and to use their efforts to have the same carried into effect, also to make such suggestion in regard to proposed legislation as they may deem advisable, and that such committee be composed of the following persons: John Hoskin, Q.C., Charles Moss, Q.C., Walter Cassels, Q.C., John Bain, Q.C., T. D. Delamere, E. Douglas Armour, J. A. Worrell and D. E. Thompson." The motion was carried.

Mr. J. K. Kerr was elected President for the ensuing year.

Mr. B. B. Osler, Q.C., thereupon vacated the chair, and Mr. Kerr, Q.C., took the chair as President.

It was moved by Mr. Moss, Q.C., seconded by Mr. E. D. Armour and carried unanimously, "That a vote of thanks be presented to the retiring President, Mr. B. B. Osler, Q.C., for his services the two years during which he had been in office."

The other officers elected were: Vice-President, James Maclennan, Q.C.; Treasurer, Walter Barwick; Curator, E. D. Armour; Trustees, Messrs. J. H. Macdonald, Q.C., Z. A. Lash, Q.C., N. G. Bigelow, A. H. Marsh and G. H. Watson; Secretary, Mr. Thomas Urquhart.

Moved by Mr. B. B. Osler, Q.C., seconded by Mr. Walter Barwick and carried unanimously, "That a vote of thanks be presented to Mr. Alexander Munro Grier, retiring Secretary, to whom it was due that a minute should be entered upon the books of the Association indicative of their appreciation of his services."

The meeting then adjourned.

REVIEW OF EXCHANGES.

Central Law Journal.—5th August, 1887.

Performance to the Satisfaction of the Promisee, by F. R. MECHEM. After a review of the authorities the learned writer concludes that the promisor must show that the promisee is satisfied, otherwise he has not performed his contract, and it is not enough to show that the performance is satisfactory to others, or that the promisee ought in reason to be satisfied; provided, however, "1. That where from the nature of the transaction a test of the performance may reasonably be held to have been contemplated by the contract, the promisee is under obligation to make such a test before he declares himself dissatisfied. 2. That in all cases the promisee must act in good faith and with honesty of purpose, and his dissatisfaction to be a defence must be real and honest and not merely feigned or pretended."

Ibid.—12th August, 1887.

Rights of a Mortgagee or his Assignee in Possession of the Mortgaged Premises, by SAMUEL MAXWELL. American cases, and some English cases, are cited.

Ibid.—19th August, 1887.

Character Evidence, by W. F. ELLIOTT. The authorities are grouped under criminal cases, and civil cases; and in the latter class under cases in which a party is charged with the commission of a crime, assault and battery, breach of promise, divorce, libel and slander, and malicious prosecution.

Ibid.—26th August, 1887.

The Right to Begin and Reply, by SEYMOUR D. THOMPSON. The rule is thus stated:—That where the plaintiff has anything to prove, in order to get a verdict, whether in an action *ex contractu* or *ex delicto*, and whether to establish his right of action or to fix the amount of his damages, the right to begin and reply belongs to him; citing *Mercer* v. *Ashall*, 5 Q. B. 447. Where the action is for unliquidated damages, unless both cause of action and amount of damages are admitted, the plaintiff has the right to begin and reply, but where the contract liquidates the amount, and is admitted, the defendant begins. Where the contract does not liquidate the damages the plaintiff begins.

THE

CANADIAN LAW TIMES.

MAY, 1888.

HAVE THE PROVINCIAL LEGISLATURES POWER TO APPOINT POLICE MAGISTRATES?

THIS question has been answered in the affirmative by the Divisional Court of the Queen's Bench Division in the case of *Regina* v. *Bush* (*a*), but as the judgment in that case was not appealed from, by reason of its not being appealable under the existing practice, and as the same question is likely to hereafter arise before some appellate Court or Courts in some other form of proceeding which will admit of an appeal, it is perhaps worth our while to consider some of the reasons why the question should be answered in the negative.

The Provincial Legislatures have no power to pass any enactment authorizing the appointment of Police Magistrates unless that power is conferred by the B. N. A. Act. In a case involving the right of a Lieutenant-Governor to appoint Queen's Counsel under the authority of the Provincial Statute which declares that "it has been and is lawful" for the Lieutenant-Governor to make such appointments, Mr. Justice Gwynne, delivering judgment in the Supreme Court of Canada, says: "Now, if 'it has been and is lawful' for the Lieutenant-Governor to make Queen's Counsel, it can only be so by the provisions of the B. N. A. Act. If that Act does confer the power upon the

(*a*) 8 Occ. N. 131; to be reported in 15 O. R.

Provincial Executive, no doubt the Lieutenant-Governor has it, and a Provincial Act can add no force to the Imperial Act; but if the Imperial Act does not confer the power, then the Lieutenant-Governor has it not, nor can any Act of the Provincial legislature effectively declare that he has, or by enactment pointing to the future, confer it upon him" (*b*).

It is contended on the part of the Provinces that such power is conferred by section 92, sub-section 14 of that Act, which empowers the Provincial Legislature to "exclusively make laws in relation to the administration of Justice in the Province, including the constitution, maintenance and organization of the Provincial Courts, both of civil and of criminal jurisdiction, and including procedure in civil matters in those Courts," and there is no pretence that any other sub-section of section 92 confers any such power.

The question with which we are dealing has been answered by a considerable number of Courts in several of the Provinces, and their answer has been uniformly in the affirmative, but it is worthy of remark that notwithstanding this unanimity, but few of the courts or Judges are able to agree upon any common ground in support of their judgments. Possibly this fact may be accounted for by the fact that the potent reason which was probably common to them all, and which probably more than any other reason influenced their judgments, is not dwelt upon in any of their judgments; that is, the reason based upon what they deem to be public expediency. They could not help considering the inconvenience and confusion which would arise from holding that all the acts done by Provincial Police Magistrates and Justices of the Peace during the twenty years of Confederation have been done without authority, and this has doubtless caused them to earnestly and astutely seek for reasons in support of an affirmative answer to the question. Such a search under such circumstances was likely to produce, and has produced, a motley collection of divers reasons.

(*b*) *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 639.

The learned Judges of the Queen's Bench Division have apparently pinned their faith to two propositions. They say in the first place that the power in question is conferred upon the Provincial Legislatures along with the power to "Exclusively make laws in relation to the administration of Justice in the Province," and then they say that if there is any doubt about this, there is no doubt that the Provincial Legislatures have assumed the right to pass laws providing for the appointment of Justices of the Peace, and that Justices of the Peace, Police, and Stipendiary Magistrates have been appointed in pursuance of such laws, and that "the Dominion Government has never in any way or at any time interfered with any such appointments," and that "the Parliament of Canada has from time to time since the passing of the British North America Act passed laws recognizing the right so assumed and the appointments so made," and that "the Dominion Parliament has in numerous Acts recognized the status of Police Magistrates appointed by the legislatures of the Provinces" and "the legislatures of the Provinces have from the time since the British North America Act went into force down to the present time acted on the assumption that they possessed the power in question," and that "the Dominion Parliament has apparently acted upon the same assumption," and that "an Order-in-Council published in the *Canada Gazette*, at p. 802 for the year 1886, shows the application of certain fines received by the Dominion Government under the convictions of Magistrates appointed by the Provincial authorities," and that whatever doubt there may have been as to the soundness of their first proposition "must be taken to be set at rest by the action of the Parliament of Canada."

Other Courts and Judges have based their judgments upon the ground, that the power in question is conferred upon the Provincial Legislatures along with the power to make laws in relation to the "constitution" of the Courts, or along with the power to make laws in relation to the "organization" of the Courts.

Others go upon the ground that section 96 of the Act,

which confers authority upon the Governor-General to appoint certain judicial officers, must be construed with reference to the maxim *expressio unius exclusio est alterius*, and that when so construed the section in question by implication declares that the Dominion authorities shall not have power to authorise the appointment of any judicial officers other than those named in the section.

Others go upon the ground that the executive authority was continued in the Local Executive as it existed before the Union Act, and others have based their judgments upon many other reasons which bear their own reputation upon their face as soon as they are dressed in the garb of plain and sober English.

The phrase "administration of justice," in s-s. 14 of s. 92, is used in such a sense that it is evident that the Imperial Parliament did not consider that it would of itself include either the constitution, maintenance and organization of the Courts, or the procedure in civil matters, without its being expressly provided that it should include the same. This gives us a parliamentary exposition of the meaning of the phrase "administration of justice" as used in that Act, which exposition shows that the phrase in question standing alone was not intended to include such a power as that of appointing judicial officers; and whatever the force or meaning of that phrase might be if independently used in some other statute or some other instrument, yet its force and meaning in this particular statute must be controlled and ascertained by reference to the context which shows the intent of the Parliament that enacted it.

The Imperial Parliament apparently intended that the phrase "administration of justice," as used in the Act in question, should not, without the use of the phrase beginning with the word "including," confer power upon the Provincial Legislatures to make laws in relation to the constitution, maintenance and organization of Provincial Courts, for otherwise, in order to give due effect to the whole of s-s. 14, we should have to construe the clause, beginning with the word "including," as a clause exclu-

sively defining the whole of the jurisdiction conferred by and included within the phrase "administration of justice." It does not seem probable that the Imperial Parliament intended that the phrase "administration of justice" should include those powers, and those only which are enumerated after the word "including." We are therefore forced to the conclusion that Parliament used the phrase "administration of justice" in so restricted a sense that it would not have included the power to make laws in relation to the constitution, maintenance and organization of the Courts, if it had not been expressly enacted that it should include those powers. If then the phrase, when taken by itself, is used in so restricted a sense that it does not of its own force include the constitution, maintenance and organization of the Courts, much less can it be said to include the power to appoint the Judges of those Courts. Webster defines "administration" as being "dispensation; distribution; exhibition; as, the administration of justice, of the sacrament, or of grace."

As well might it be said that conferring power upon a priest to administer the sacrament clothes him, by implication, with power to ordain other priests, as to say that the power to make laws in relation of the administration of justice, carries with it by implication the power to appoint Judges to administer justice.

If we are correct in our conclusion that the phrase "administration of justice" as used in sub-section 14 does not confer the power to appoint judicial officers, it follows that that power is not given by sub-section 14, unless it is included within the power to make laws in relation to the "constitution, maintenance and organization of the Courts."

It is submitted that the power in question is not given by implication along with the power to make laws in relation to the "*constitution*" *of the Courts.* The word "constitution" as here used means nothing more than the "*form of government*" (c).

(c) See *McRae* v. *McLeod*, 26 Gr. at p. 258-9; Abbot's Law Dict.; Bouvier's Law Dict.

"A constitution is, according to the American idea, the organization of the government, distributing its powers among bodies of magistracy, and declaring their rights and the liberties reserved and retained by the people" (*d*).

Nor does the power to make laws in relation to the "*organization*" *of the Courts* carry with it the power in question. The word "organization" is used in two senses, in one of which it means a *state or condition*, and in the other of which it has two meanings, one of which is used merely with reference to the *arrangement of the parts or organs* of a compound body, and the other of which includes the appointment of the said parts or organs, but the former is the primary meaning (*e*). Webster, by way of illustration, quotes as follows from Coleridge: "What is organization but the connection of parts in and for a whole so that each part is at once end and means."

The result then is that the Provincial Legislatures are authorized to make laws in relation to the *form of government* and the *maintenance* and the *arrangement of the parts* of Provincial Courts.

A police magistrate or Justice of the Peace out of session does not constitute a Court, and the legislature, or the Lieutenant-Governor acting under its authority, does not constitute or organize a Court by appointing a Justice of the Peace; when the Justice has been duly appointed, he may by sitting as such Justice constitute a duly organized Court, and while sitting in that Court he may administer justice, and the legislature may make laws in relation to such administration of justice, and in relation to the constitution, maintenance and organization of such Court. The legislature may make laws in relation to the administration of justice, by enacting that such justice shall be administered at some particular time or at some particular place only; and that such Court shall be properly constituted after some specified ceremony has been performed, and that it shall be maintained by fees and fines which

(*d*) *French* v. *The State*, 52 Miss. 762.

(*e*) See Imperial Dict. and Webster's Dict. under "Organization."

are to be paid by suitors, and that it shall be deemed to be properly organized when one, two or more Justices shall be in session.

There can be no doubt that the Provincial Legislature might make laws in relation to the constitution, maintenance and organization of a second Court of Appeal in this Province, and in relation to the administration of justice by that Court of Appeal, and yet that Court although duly constituted and organized within the meaning of the B. N. A. Act, might never be able to administer justice, because of the refusal of the Dominion Government to appoint any Judges for such a Court.

On the other hand, the Provincial Legislature could probably abolish the jurisdiction of the Court of Appeal and the High Court of Justice, in so far as the same concerns property and civil rights, and might confer that jurisdiction upon police magistrates and justices of the peace. As the power to appoint the Superior Court Judges is expressly conferred upon the Governor-General, it is apparent that, in so far at least as the Superior Courts are concerned, the power to "make laws in relation to the administration of justice in the Province, including the constitution, maintenance and organization of Provincial Courts," does not carry with it the power to appoint the Judges of those Courts. Whatever might be the meaning of the phrase when used in some other connection, yet it does not confer this power when used in the B. N. A. Act.

Mr. Justice Gwynne deals with this question as follows: "Now, as it appears to me, Courts for the administration of justice would be very imperfectly organized without Judges. They form a very important constituent in the organization of the Courts, and until their appointment it cannot be said with accuracy that the Courts are completely constituted and organized. As the appointment then of the Judges rests with the Dominion Government and the power to remove them is vested in the Dominion Parliament, and as no alteration in their constitution can be effected without the assent of the Dominion Government to the Act of the Provincial Legislature passed for the

purpose, it would be more consistent with the frame of our constitution, as it appears to me, to speak of all newly created courts as being constituted and organized by the united action of the Dominion and Provincial authorities" (*f*).

The canon of construction adopted by the Privy Council shows that unless the power in question falls within one of the classes of the subjects enumerated in section 92 of the B. N. A. Act, it is not conferred upon the provincial legislatures. "The first question to be decided is whether the Act impeached in the present appeal falls within any of the classes of subjects enumerated in section 92 and assigned exclusively to the Legislatures of the Provinces, for if it does not, it can be of no validity and no other question would then arise. It is only when an Act of the Provincial Legislature *prima facie* falls within one of these classes of subjects that the further questions arise, viz., whether, notwithstanding this is so, the subject of the Act does not also fall within one of the enumerated classes of subjects in section 91, and whether the power of the provincial legislatures is not thereby overborne" (*g*).

There can be no pretence that the power with which we are dealing falls within any of the classes of subjects enumerated in section 92, unless it falls within sub-section 14 which has just been discussed.

The right to appoint Justices of the Peace is one of the prerogatives of the Crown as the fountain of honour and of justice. At Common Law the King by virtue of his prerogative always had the power to appoint Justices of the Peace, and by 27 Henry VIII. c. 24, s. 2, the power to make such appointments was limited to the King alone (*h*).

The royal prerogative is as extensive in a colony as it is in England (*i*), and the Crown has not by the B. N. A. Act

(*f*) *Re Niagara Election Case*, 29 C P. at p. 280.

(*g*) *Citizens* v. *Parsons*, 7 App. Cas. at p. 109; followed in *Dobie* v. *The Temporalities Board*, 7 App. Cas. 149; and *Russell* v. *The Queen*, 7 App. Cas. 836.

(*h*) See *Jones* v. *Williams*, 3 B. & C. 762.

(*i*) *Re Bateman's Trust*, L. R. 15 Eq. at p. 361.

renounced or abdicated its prerogatives as the fountain of justice and honour over the Dominion of Canada or any part thereof (*j*).

The right to exercise the royal prerogative in this Dominion is vested in the Governor-General, and not in the Lieutenant-Governors (*k*).

It is true that the royal prerogative may be abolished by colonial enactment over which the Crown has the right of veto; for the sovereign by not exercising the power of veto does in effect assent to the enactment and thereby becomes a party to it (*l*); but it does not follow from this that a Provincial enactment may affect the royal prerogative by virtue of its not being vetoed by the Governor-General, for by our constitution the power of veto is given to the Governor-General in Council, and not to the Governor-General personally, while the royal prerogative is exercised by him personally, acting as delegate of the Sovereign under royal patent an d commission (*m*).

A colonial governor does not represent the Sovereign generally, but he is an officer to execute those specific powers which are delegated to him by his commission (*n*).

The Governors-General of Canada, both before and since Confederation, were and have been expressly authorized by their commissions to appoint Justices of the Peace. Lord Monck, the last Governor-General of the Province of Canada and the first Governor-General of the Dominion of Canada was so expre ssly authorized by each of his commissions (*o*).

(*j*) *Per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 619.

(*k*) *Per* O'Connor, J., in *Gibson* v. *McDonald*, 7 O. R. at p. 421-2; *Per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 624; *Per* Taschereau, J., in *Mercer* v. *Atty.-Genl.*, 5 S. C. R. at p. 671; *Per* Armour, J., in *Wilson* v. *McGuire*, 2 O. R. at p. 128.

(*l*) See *Re Louis Marois*, 15 Moore P. C. C. 189.

(*m*) See *per* Taschereau, J., in *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 624, and *per* Henry, J., in S. C. at p. 613.

(*n*) *Hill* v. *Bigge*, 3 Moore P. C. C. at p. 476.

(*o*) See the former Commission in the Journals of the House of Assembly for 1862, Appendix No. 34, p. 1, and the latter Commission in the Sessional Papers of the House of Commons, 1867-8, vol. 1, No. 7, paper 22.

During Lord Dufferin's tenure of office the question of the form and phraseology of the Governor-General's Commission was much discussed between Lord Carnarvon and Mr. Blake (*p*); but the new Letters Patent and Commission, which were the result of that discussion, still expressly authorized the appointment of Justices of the Peace by the Governor-General (*q*), and the commission issued to the present Governor-General empowers and commands him to exercise and perform all the powers and directions contained in the said patent (*r*).

No such power of appointment is given to the Lieutenant-Governor of this province in his commission (*s*).

We find, therefore, that in so far as concerns executive as distinguished from legislative functions, the power to make such appointments as the one now in question lies with the Dominion authorities, and not with the provincial authorities.

It is argued on behalf of the provinces that section 96 of the B. N. A. Act provides that the Governor-General shall appoint the Judges of the Superior and certain other Courts, and that by application of the maxim *expressio unius exclusio est alterius*, this must be taken to confer upon the provinces the power to authorize the appointment of all other judicial officers.

This argument, by application of the maxim, may have some force as to the limitation of the powers possessed by the Governor-General in virtue of his office as created under the B. N. A. Act, but it does not apply to any powers which may be conferred upon him by Dominion enactment, or by Royal Patent or Commission.

The various provincial enactments authorizing the appointment of Judges in this Province before Confederation, conferred that authority in almost every conceivable variety of phraseology. One statute purported to authorize Her Majesty to make such appointments by Letters Patent

(*p*) Sess. Papers of Canada, 1877, No. 13.
(*q*) Sess. Papers of Canada, 1879, No. 14.
(*r*) Sess. Papers of Canada, 1884, No. 77.
(*s*) Sess. Papers of Ontario, 1882-3, No. 29.

under the Great Seal of the Province (*t*) ; another statute authorized the Governor to make such appointments (*u*) ; while another authorized the Governor by Commission under the Great Seal (*v*) ; and another authorized the Governor under the Great Seal (*w*) ; and another authorized the Governor-in-Council (*x*).

Doubtless there was a similar lack of uniformity in the other Provinces, and section 96 was intended to produce uniformity in this respect, and was not intended to operate by way of distributing power between the Dominion and the Provinces, for which latter purpose it is not aptly worded.

The effect of this section is that the appointment of the inferior judicial officers shall be left to be dealt with by Dominion Statute, or in default thereof by the Governor-General, acting under his commission as a delegate of the Crown, but the enumerated judicial officers shall be appointed as indicated in the section,—*notwithstanding any colonial legislation on the subject.*

It is argued on behalf of the Provinces that section 65 of the B. N. A. Act confers the power in question upon the Lieutenant-Governor of the Province. There might be some show of force in this argument if it were not that section 12 of the same Act may with equal force be said to confer it upon the Governor-General.

Moreover, if the power to make any judicial appointments is conferred upon the Lieutenant-Governor by section 65, then there would follow this anomaly that the power in question would be possessed by the Lieutenant-Governors of Ontario and Quebec, and not by the Lieutenant-Governors of any of the other Provinces, for the operation of section 65 is confined to the Provinces of Ontario and Quebec.

(*t*) C. S. U. C. c. 10, s. 7.
(*u*) C. S. U. C. c. 128, s. 94.
(*v*) C. S. U. C. c. 13, s. 3.
(*w*) C. S. U. C. c. 15, s. 2.
(*x*) C. S. U. C. c. 54, s. 49.

In the Quebec Act of 1774, in the Constitutional Act of 1791, and in the Union Act of 1840, the Colonial Legislature was authorized to legislate for the "Peace, welfare and good government" of the Provinces, and these words were used for the purpose of conferring upon the Provincial Legislatures whatever general legislative authority they possessed, and it was by virtue of these words that the Parliament of the late Province of Canada assumed to legislate with regard to the appointment of Judges.

Section 91 of the B. N. A. Act authorizes the Parliament of Canada to "make laws for the peace, order, and good government of Canada, in relation to all matters not coming within the classes of subjects by this Act assigned exclusively to the legislatures of the provinces," and it has already been shown that the power now in question does not fall within any of those classes of subjects.

When dealing with the question as to the right of the Dominion Parliament to pass *The Canada Temperance Act* the Privy Council says:—"It cannot be contended, and indeed was not contended at their Lordship's Bar, that if the Act does not come within one of the classes of subjects assigned to the Provincial Legislatures, the Parliament of Canada has not by its general power 'to make laws for the peace, order and good government of Canada,' full legislative power to pass it" (*y*).

Besides the case of *Regina* v. *Bush*, there are several cases in which the question that we are discussing has been more or less directly dealt with (*z*), but the only one which calls for any special remark is *Reg.* v. *Coote* (*a*), which holds that a Provincial Legislature may constitute a Provincial Court (Fire Marshall's Court) with power to investigate the origin of fires and to examine witnesses on oath, and may appoint the officers of such Court. It is to

(*y*) *Russell* v. *The Queen*, 7 App. Cas. at p. 836.

(*z*) See *Reg.* v. *Reno*, 4 P. R. 281; *Reg.* v. *Bennett*, 1 O. R. 445; *Richardson* v. *Ranson*, 10 O. R. 387; *Reg.* v. *Homer*, 2 Cart. 317; *Ganong* v. *Bayley*, 1 Pug. & Bur., N. B. 324; *Ex parte Williamson*, 24 Sup. Ct. N. B. 64; *Ex parte Perkins*, 24 Sup. Ct. N. B. 66; *Reg.* v. *Coote*, L. R. 4 P. C. 599; *Re Wilson* v. *McGuire*, 2 O. R. at p. 128-9; *Re Boucher*, 4 App. R. 191.

(*a*) L. R. 4 P. C. 599.

be borne in mind that the Commissioner or head of such a Court is not a person known to the Common Law as a judicial officer, and is not one whose appointment would involve the exercise of the royal prerogative.

Although the Crown may by its prerogative establish Courts to proceed according to Common Law, it cannot create any new Court to administer any other law (*b*); and it may be that although a Provincial Legislature, which is authorized to make laws in relation to the constitution, maintenance and organization of Provincial Courts, may authorize the appointment of those officers of such Courts whose appointment does not involve the exercise of the royal prerogative, yet it may be unable to authorize the appointment of any officer whose appointment does involve the exercise of the royal prerogative.

We have already referred to the great variety of reasons which have been advanced by a variety of Courts in support of the Provincial pretensions, and have adverted to the fact that the Courts and Judges have been unable to agree upon any common ground supporting their judgments, and we have noticed the chief suggestions and arguments which have been advanced as pointing to the common goal, and have answered all of them except one. This one is the one upon which the Queen's Bench Divisional Court, in *Regina* v. *Bush*, places its chief reliance; for this one that Court apparently has an affection somewhat akin to that which Touchstone had for Audrey, an affection based upon an underlying sense of proprietary right (*c*). That Court points out that the Provincial Legislatures have assumed the right to pass laws providing for the appointment of Justices of the Peace, and that Justices of the Peace and Stipendiary Magistrates have been appointed in pursuance of such laws, and that "The Parliament of Canada has from time to time since the passing of the

(*b*) *Re Bishop of Natal*, 3 Moore P. C. N. S. 115, and *arguendo* at p. 128, and in judgment at pp. 148 and 152.

(*c*) *Touch.* A poor virgin, sir, an ill-favoured thing, sir, but mine own; a poor humour of mine, sir, to take that that no man else will.—*As You Like It*, Act v., Scene iv.

British North America Act passed laws recognising the right so assumed and the appointments so made." We have already furnished several quotations from the judgment to show the protean shape which that proposition assumed, but the quotation lastly above given probably puts it in as favourable a light as possible.

The Queen's Bench Divisional Court has not favoured us with any full statement of the principle upon which its proposition is founded, and therefore we are left to grope for it.

If, as between subject and subject, such a proposition were advanced, it would undoubtedly be founded upon the doctrine of estoppel, but it is submitted that the doctrine of estoppel can have no place as against the Crown. Whichever branch of our legislature has the power to authorize the appointment in question, whether it be the Dominion Parliament or the Provincial Legislature, that branch for that purpose represents the Crown, and in that representative capacity, can be bound by no estoppel. Whatever prerogative powers are by the B. N. A. Act conferred either upon parliament or upon the legislatures, those powers are by them held in trust, and their *cestuis que trustent*, the people, are not to be estopped by any laches or acquiescence on the part of their trustee. All statutes of limitation and common law doctrines as to prescription are based upon the doctrine of estoppel, yet these statutes and these doctrines have no legal effect as against the Crown, unless it be by reason of some express statutory enactment providing that the Crown shall be bound thereby. Quite apart from the provisions of any statute of limitations, the Courts of Equity have always given effect to a defence founded upon the laches or the acquiescence of the plaintiff, but no person ever heard of a Court of Equity enforcing that doctrine as against the Crown.

It is true that the British Constitution has been moulded and in a great measure formed by custom, usage and acquiescence, but the British Constitution is peculiar in that respect, and its modifications so effected can in no way be treated as a precedent in connection with the interpre-

tation of our written constitution. Even in the case of the British Constitution, the modifications referred to were not recognized as effective until after very extended periods of acquiescence, while on the other hand the whole life of our written constitution is but as a day in the life of a nation.

The doctrine of acquiescence and estoppel is an edged tool which is dangerous to be used even in connection with an unwritten constitution, but it would be nothing short of disastrous to have it introduced as a recognized method of interpretation to be applied to our written constitution.

The learned Judges of the Queen's Bench Division suggest that their proposition may be based upon the rule of interpretation, that where the terms of a written contract or other like document are ambiguous, some effect is to be given to the contemporaneous construction thereof acted upon by the parties thereto at the time of or shortly after the execution of the document. This rule to a very limited extent is applicable as a rule of interpretation, but in so far as it can be supported in principle it would seem to be merely a branch of the doctrine of acquiescence or estoppel. The task of interpreting the B. N. A. Act is one which is imposed upon the Courts alone, and fortunately is not left to the politicians in parliament or in council. If the Dominion Parliament were to pass a statute declaring that according to the true intent and meaning of the B. N. A. Act, the Dominion Parliament alone has power to legislate with regard to direct taxation within the Provinces, in order to the raising of revenue for provincial purposes, it would scarcely be contended that any recognition or even direct legislation by one of the Provinces, or indeed by all of the Provinces together, could render this Dominion enactment effectual; and this would be so because the powers conferred upon parliament and upon the legislatures by the B. N. A. Act are inalienable, and because to the Courts and the Courts alone belongs the power to interpret the statute in question.

We presume that no person would attempt to uphold the validity of such a statute as the one above suggested,

for the reason that its declaration of the construction and meaning of the B. N. A. Act would be contrary to the plain provisions of that Act, and the question of construction is one for the Courts alone, and cannot be dealt with by a colonial parliament or legislature. It is submitted that it can make no difference in principle that the question of construction in a particular case happens to be involved in some doubt; it is still a question solely for the Courts, and no laches, acquiescence, or even direct legislation by the Dominion Parliament or a Provincial Legislature, or by the whole of them combined, can in any way affect that question of construction of a statute which brings them into existence, and defines their respective powers.

Parliament can make no laws which a succeeding parliament, or even the same parliament, cannot repeal, and it would be very strange if it could bind itself by any laches or acquiescence from which its successors could not free themselves, as it would thus be enabled to do by indirect means what it could not accomplish by direct legislation.

In Great Britain the exposition of the provisions of the the Constitution by the practice of the government officials, when accompanied by parliamentary recognition, may well have given to it a much more potent significance than should be given to a similar practice and similar recognition in this country, for in England the parliament is supreme, and the Courts are wholly subordinated to it, while in this country the Constitution is written, and the powers of parliament are to be ascertained by application of the canons of construction, and rules of legal interpretation to the provisions of that Constitution and this function is wholly judicial, and not executive or legislative, and it consequently falls wholly within the jurisdiction of the Courts, and no declaration, act, acquiescence, laches or enactment of any or all of our colonial legislative bodies can affect the interpretation of the Imperial Statute which forms our Constitution.

It may be that if the Provincial Legislatures have appointed, or have authorised the appointment, of Pro-

vincial officers, and have called them by any particular name, the Dominion Parliament may appoint the same man to fill an office which entitles them to bear the same name; that is, Provincial officers may, by Dominion Statute, be adopted and appointed as Dominion officers, and as such Dominion officers they may be entitled to the official name by which they have been designated by the Provincial Legislatures. A question somewhat cognate to this arose in the case of *Valin* v. *Langlois* (*d*), where the Dominion Parliament had authorised the Provincial Courts to try Dominion Election Petitions, and it was held that the Dominion Parliament had adopted the Provincial Courts and had made them Dominion Courts *pro hac vice*.

No Dominion legislation can be relied upon as ratifying the appointment of Police Magistrates, by or under the authority of the Provincial Legislatures, unless it be shown that the Provincial officers, so appointed, have been adopted by the Dominion Parliament as Dominion officers.

The mere fact that a Provincial Legislature has assumed to appoint officers, whom it has chosen to call Police Magistrates, and that the Dominion Parliament has not authorized the appointment of any such officers, and that the Dominion Parliament has passed statutes conferring jurisdiction upon Police Magistrates, will not be sufficient to show that such Dominion Statutes have adopted the Provincial appointments and have made Dominion officers out of those persons who received their original appointment as Police Magistrates under Provincial authority; for the Interpretation Act provides that the Dominion Statutes shall be construed as always speaking, and, although a Dominion Statute may have been passed last year conferring certain jurisdiction upon an officer called a Police Magistrate, and, although at the time of the passing of the statute there may have been no person who was entitled to that appellation, yet that does not render the Dominion Statute insensible, for another statute may be

(*d*) 3 S. C. R. 1; Affirmed. L. R. 5 App. Cas. 115.

passed next year providing for the appointment of Police Magistrates, who will enforce the provisions of the Dominion Statutes as soon as Parliament desires them to be enforced.

When the Dominion Parliament refers in a statute to a Justice of the Peace, or a Police Magistrate, it refers to an officer appointed by competent authority, and not to one appointed by an usurped authority.

It is true that where a Provincial Legislature has assumed to appoint an officer, and to designate him by a certain name, the Dominion Parliament may adopt that person and clothe him with authority, and make him a Dominion officer, and that as such Dominion officer he may be entitled to the name by which he was called under his provincial appointment; but, in order to accomplish such a purpose, the intent of the Dominion Parliament must be clearly and unmistakably expressed, and no Court should extract any such assumed intention by implication from any ambiguous provisions of a Dominion Statute.

We assume that a Provincial Legislature might appoint a permanent commissioner to investigate irregularities in the public offices which are within Provincial control, and that it might clothe him with all judicial powers which lie within the power of the legislature to confer, and it might call him Chancellor, yet this would not make him an Equity Judge, and would not invest him with the powers of a Court of Equity, and his powers would be in no way increased by subsequent Dominion legislation recognizing the existence of a Chancellor.

Mr. Justice Taschereau speaking of Provincial Queen's Counsel says :—"These provincial officers, it is true, are to be known under the name of Her Majesty's Counsel learned in the law for the Province of Nova Scotia. But that does not make them of the rank and dignity of that name grantable by Her Majesty, and the statute does not pretend to make them so. It is a new provincial office under that name that has been created in Nova Scotia, and nothing more. The legislature had, in my opinion, full power and authority to do so. They can create

provincial officers for the administration of justice, and call their officers by any name they choose. There can be provincial officers known as Nova Scotia Queen's Counsel, just as well as there can be provincial officers known as Quebec Knights, Ontario Baronets and Manitoba Lords" (*e*).

In framing the Provincial Resolutions passed in Quebec, in 1887, it was considered necessary by the provincial delegates that the power now in question should be conferred upon the Provincial Legislatures by Imperial Statute (*f*).

A. H. MARSH.

(*e*) *Lenoir* v. *Ritchie*, 3 S. C. R. at p. 626.
(*f*) See 8th Resolution in 7 C. L. T. 289.

EDITORIAL REVIEW.

Foreclosure and Creditors' Relief Act.

The case of *Harvey* v. *McNeil*, 12 P. R. 362; 8 Occ. N. 75, revives the question whether in foreclosure actions, one day for redemption of the plaintiff should not be fixed in default of which all defendants should be foreclosed. We have before referred to this question (5 C. L. T. 111). The rule has been adopted in Manitoba, as will be seen by reference to our former remarks, and can work no injustice to those who take their securities with notice of all prior incumbrances. The strongest grounds upon which it can be put is this: That after the creation of one mortgage, while that remains the only incumbrance, the mortgagor is subject to be foreclosed in six months; but by his own act in creating subsequent mortgages he takes away from the first mortgagee that right, and gains for himself a further respite of three months for every fresh mortgage.

The Divisional Court of Chancery in *Dawson* v. *Moffatt*, 11 Ont. R. 484, adopted a rule as to distribution of funds in Court analagous to the provisions of the Creditors' Relief Act, and there seems to be no reason why a rule of foreclosure of incumbrancers by contract should not be adopted by analogy to the foreclosure of execution creditors, if indeed the reason already given is not a sufficient one.

On the other hand, waiving the question of the constitutionality of the Act, the Chancellor's dictum in *Harvey* v. *McNeil*, that "it may not be possible to fix a sum as the redemption money where all execution creditors are to share ratably," seems to point to the abandonment of foreclosure proceedings when a point is attained at which it is necessary to fix a day for execution creditors to be

redeemed. This of itself should be cause enough for hesitation in applying the Act to foreclosure proceedings. The right of foreclosure is not taken away; and yet by the mere fact of there being execution creditors whose rights have sprung up after the mortgage was created, the mortgagee may be forced to undertake an expensive and perhaps useless proceeding by attempted sale in endeavour to realize on his security. The result will be that more stringent powers of sale will be adopted than have heretofore been used, and mortgaged land will in all probability be more frequently sacrificed or burdened with costs, than it would be if the remedy by foreclosure were more speedy and just to the first mortgagee.

The Testimony of Parties.

We are informed that it is proposed in the Province of Quebec to introduce a measure providing that the parties to an action shall be competent to testify. It is a surprise to learn that in that province they are incompetent; and that the system of administering justice lags so far behind. The writer, not having lived or practised under a system which took away a man's credibility because he had a cause of complaint, or was obliged to defend himself, cannot regard any such system as otherwise than barbarous. For many years the parties to an action in this province (with several exceptions), have been on the same plane with other witnesses as to credibility and competence to testify; and not only has this provision been attended with no injustice or inconvenience, but it has resulted in the greatest justice and convenience to the suitor and to those engaged in the administration of justice. We do not find that parties as a rule are not to be relied on; and if evidence is sometimes coloured by interest, the cross-examination of the party and the watchfulness of the Judge will always detect the bias.

The subjecting of parties to examination brings with it advantages which are most valuable. Sham pleas were

always unlawful in English practice, but the sham could not be easily detected without examination of the party pleading. Hence, when liberty was given to examine the parties before trial, sham defences were easily discovered by the admission on oath of the defendant, and were struck out as groundless on motion made therefor. If the testimony of the profession in Ontario were asked as to the advisability of the proposed measure, it would be universally in favour of it.

Certain exceptions are made by our statute to the provision that parties shall be competent and compellable to testify, viz , no one is bound to answer any question tending to criminate himself or subject him to any prosecution for a penalty ; the plaintiff in an action for breach of promise of marriage must be corroborated ; husband and wife are not compellable to disclose communications made to each other during the marriage ; and in actions relating to questions of adultery, there are qualifications as to admitting adultery. With these safeguards, the provision is most useful.

Chief Justice Waite.

In the death of Chief Justice Waite of the Supreme Court of the United States a severe loss has been sustained by that country, both in the person of the learned Judge and the vacation of the office.

Personally, Chief Justice Waite was said not to have been as learned or brilliant as some of his predecessors in office, but to have been possessed of a fund of sound wisdom, steadiness, and evenness of purpose. Where the functions to be exercised are not those of shaping or carrying into action a particular line of policy, but rather preserving in a proper balance not merely the principles of municipal law, but very grave and important constitutional rights, perhaps these qualities are to be preferred ; and so, as a judge, he deserves to rank with men of more brilliant parts.

In a country where party politics run upon lines which to some extent divide the people constitutionally, the opinions of prominent men are likely to be well known; and as these matters come up for judicial investigation, it must always be a serious matter to change the Judges of a tribunal which finally settles them. So far the choice of Judges for that august tribunal has been wise, and the greatest confidence is felt that a sound discretion will be exercised in appointing a successor.

If the principle of appointing Judges to the highest tribunal in the United States, instead of electing them, is a proper one, why is it not applied to lower tribunals?

HAMILTON LAW ASSOCIATION.

A special meeting of the trustees has been held to consider the establishment of the proposed Law Faculty, the creation of a permanent Circuit List, etc. All the trustees were present, Mr. E. Martin, Q.C., in the chair.

The proposal to establish a Law Faculty was first taken up. After careful consideration it was resolved:

First, That in the opinion of the Hamilton Law Association, the scheme for the establishment and maintenance of a Law Faculty, published by the joint committee of the Law Society and Senate of the University cannot be carried out until the first and second sections of R. S. O. c. 146, are repealed, and hence that it is premature to discuss in detail the merits of the scheme. At the same time the Association desire to express generally their disapproval of the scheme.

Second, That this Association is of opinion that with the view of improving the present standard of legal education, provision should be made by the Law Society for the delivery of a course of lectures at Toronto and other centres throughout the Province, and the compulsory attendance of students thereat, and also that students for call to the Bar should be required to serve under articles in the same manner as students for admission.

The creation of a permament Circuit list and the circular of the Joint Committee of Law Associations, dated 21st March, 1888, was then considered, and it was resolved:

First, That this Association approves of the establishment of a permanent Circuit List for the trial of all actions in the High Court, and so far as Hamilton is con-

cerned for the arrangement proposed in the circular of the Joint Committee of the Law Associations, dated 21st March, 1888, provided that a jury be summoned for the January sittings.

Second, That this Association approves of the settlement definitely, before a case is called for trial, whether it is to be tried with or without a jury, as stated in the said circular.

These resolutions received the unanimous approval of the trustees.

REVIEW OF EXCHANGES.

American Law Review.—July-August, 1887.

The Boycott and Kindred Practices as Ground for Damages, by JOHN H. WIGMORE. The learned writer points out that the boycott cannot be brought within those rules which are comprehended in the term "restraint of trade." Regarding the relationship of master and servant as something of the nature of a *status*, as those of husband and wife, parent and child, guardian and ward, he shows that whatever unlawful act interferes with the relationship so as to cause damage is actionable. He thus classifies the cases:—All persuasion which is not fraudulent or slanderous is not actionable where the relationships of customer and merchant and "servant at will" and master are interfered with; but when it interferes with the relationship of a master with a servant under contract, or other contractual relationships, it is actionable. Fraud, slander, and violent interference, or any interference amounting to nuisance, are actionable in all the classes of relationships mentioned, except perhaps that violence or nuisance are probably not actionable where the ordinary contractual relationship is affected. An illustration of the application of the theory may be given. Mere competition, as where a new school was set up and attracted pupils from an existing school, is not actionable. But an action will lie for "threatening to mayhem and vex with suits" the plaintiff's customers and workmen.

Sunday Idleness, by JAMES T. RINGGOLD. The title is chosen because the paper treats of the law in Washington Territory which enforces idleness, Sunday laws allowing works of charity or necessity to be done.

Suing Receivers in Foreign Jurisdictions without Leave of the Appointing Court, by EUGENE MCQUILLIN. The general rule is stated that all proceedings against a receiver must be first authorized by the appointing Court. There is an exception in some states where no attempt is made to interfere with the receiver's possession, but an effort is made only to obtain judgment at law; but this is shown to be without sound reason.

Services of Experts in the Conduct of Judicial Enquiries, by CLEMENS HERSCHEL, C.E. The writer proposes that instead of the present method of calling experts as witnesses the Court should be at liberty to call them in as the servants of the Courts—*informatores judicis.* There is the danger here of the experts becoming the judges of the case.

Some interesting observations were recently made by Lord Halsbury, L.C., in *Clerk* v. *Lindsay*, noted in the Weekly Notes of 10th March, 1888, upon referring to an expert. His Lordship said, "I regret that an experiment, which seems to be as novel in the law of Scotland as it is in the law of England, of remitting the case to somebody else to decide, which is substantially what the remit to Professor T. amounted to, should have occurred. I am quite aware both the learned Judge who did it, and the learned Judges who commented upon it, affected to dismiss from their minds the result of that examination; but I certainly myself should maintain that the most candid and impartial mind which ever existed is wholly unable to analyse with sufficient precision the mental process by which a conclusion is arrived at, to say that it has not been affected by this or that which it may have heard."

Municipal Warrants, by CHARLES BURKE ELLIOTT. Municipal warrants are instruments drawn by the officers of a corporation upon its treasurer directing him to pay a certain sum of money. When the power to issue them is not directly conferred by charter or statute it is said that it is implied as incident to the general purposes of a municipal corporation.

Ibid.—September-October, 1887.

National Divorce Legislation, by SAMUEL MAXWELL. The learned writer thinks that legislation respecting divorce should be retained by the States and not committed to Congress, and that the present evils attending the granting of divorces might be averted by the exercise of greater vigilance by the Courts.

Innkeepers' and Boarding-house Keepers' Liens, by LEONARD A. JONES. The lien of an innkeeper attaches to all property brought to an inn by a guest and ostensibly his own, or received in good faith by the innkeeper as the property of the guest. There is no obligation upon the innkeeper to inquire into the title of the property, unless he knows or is suspicious that the property is stolen. The lien attaches not only on such property as a guest ordinarily takes with him, but may even attach upon such an article as a piano. The property must be placed in the inn by the guest or by his authority. It is liable generally for the whole of the expense incurred. Thus, horses brought to an inn are not liable for their own keep only, but are liable generally for their own keep and the expense of the guest. The person and the clothes and ornaments on the person of the guest are not detainable, nor is anything in the actual possession of the guest the detention of which would necessitate interference with his person. Property exempt from execution may become subject to the lien. A boarding-house keeper has no lien except by statute. Possession is essential to the lien. Hence, if the innkeeper allows the guest to take the goods he cannot re-take them unless they have been taken by fraud. The lien is not defeated by the occasional absence of the guest. The lien cannot be enforced by sale by the innkeeper without process. His right is to detain the goods until the bill is paid.

The Watering of Railroad Securities, by EDWARD L. ANDREWS. Some remarks upon the necessity of confining the power of railroad companies to issuing stock for actual cost of construction only.

The Law of Real Estate Brokers' Commissions, by EDGAR G. MILLER, JR. A number of cases are discussed upon the employment of the broker and what services by him entitle him to a commission. When a broker is employed by both vendor and purchaser, if the double employment is not known to either vendor or purchaser, or if known to one and not to the other, the broker cannot recover from either. But where it is known to both parties the commission can be recovered.

Judgment by default against non-resident defendants considered constitutionally, by CONRAD RENO. The leading case of *Pennoyer* v. *Neff*, 95 U. S. 714, is cited for the proposition that judgment by default without personal service or voluntary appearance is void. If the defendant voluntarily appears generally he submits to the jurisdiction, but if he appears to object to the jurisdiction he does not. Service by publication is said not to be "due process of law." There is an exception in divorce proceedings, and where the defendant appoints an agent to accept service. As to corporations, it must appear that the foreign corporation is carrying on business in the foreign State, that such business is transacted by some agent appointed in the State, and that some local law exists making such corporation or foreign corporations generally amenable to suit there, as a condition of doing business in the State.

Donationes Mortis Causa, by THOMAS FRAZER REDDY. A very valuable article, illustrated by numerous citations, upon the whole subject.

Interference with Social Relations, by JOHN H. WIGMORE. A continuation of the article on The Boycott and Kindred Practices, in the preceding number of this Review.

Central Law Journal.—2nd September, 1887.

Insanity, by M. D. EWELL, concluded in the following number. This article is abridged from a promised work by the author on Medical Jurisprudence. Various definitions of insanity are culled from writers of acknowledged authority, but the learned writer's conclusion is that there is no legal test. The various kinds of insanity are defined, the classification being symptomatological. Legal responsibility for crime, and upon contracts, is touched upon.

THE

CANADIAN LAW TIMES.

JUNE, 1888.

ANCILLARY GRANTS OF PROBATE AND LETTERS OF ADMINISTRATION.

"THE title of executors and administrators to movable property situated in foreign countries, if acknowledged at all," says Mr. Justice Story (*a*), "is acknowledged *ex comitate*, and of course it is subject to be controlled or modified as every nation may think proper with reference to its own institutions, and its own policy, and the rights of its own subjects; the rule being that no nation is under any obligation, excepting such as may be imposed by considerations of international comity, to enforce foreign laws." And in fact, personal property in a state or country, other than that of the domicil, belonging to a deceased person, could not be obtained by the party having the right to it, but for the recognition and acceptance by civilized nations of a principle of international comity expressed in the maxim *mobilia sequuntur personam*, which is said to be the only principle of the whole of our law as to domicil when applicable to the succession of personal estate (*b*). And that principle is only given effect to through the medium of a representative appointed by the proper court of the state in which such personal property is situated (*c*). And it is in pursuance of the same

(*a*) Story's Confl. Laws, s. 512.
(*b*) *Freke* v. *Carbery*, L. R. 16 Eq. 461; *Gentilli*, L. R. 9 Eq. 541.
(*c*) Story's Confl. Laws, s. 513.

principle of international comity that such appointments are made (*d*).

Hence the general rule, as stated by Sir J. P. Wilde:—that where a person dies domiciled in a foreign country and the court of that country invests anybody, no matter whom, with the right to administer the estate, the Court of Probate ought to follow the grant simply because it is the grant of a foreign court, without investigating the grounds on which it was made, and without reference to the principle on which grants are made in England (*e*).

And that is deemed the principal or primary administration which is granted in the country of the domicil, for the final distribution of the effects among the heirs or distributees is to be decided by the law of the domicil; and any other administration which is granted in any other country is treated as in its nature ancillary, merely, and is generally subordinate to the original administration (*f*).

In the leading case, *Enohin* v. *Wylie* (*g*), Lord Chancellor Westbury puts the case thus:—"A man makes a will according to the law of the country in which he is domiciled; he has some personal property in a foreign country, that foreign country has the duty of granting an ancillary administration, which ought to be granted to those entitled by the law of the country of the domicil." In that case the domicil was Russia; the testator had personal property in England, as well as in Russia, and the will which contained a general appointment of executors had been proved by them in the proper court in Russia. But it appeared that letters of administration had been issued by the Court of Probate in England as to the property in England as in the case of an intestacy; and his Lordship, in delivering the judgment of the House of Lords, said (p. 14) that upon the Probate Court being satisfied of the facts, it was the duty of that court, at once to revoke the letters of administration which had been

(*d*) *In Countess de Vigny*, 34 L J. (N. S.) P. M. & A. 59.
(*e*) *Smith*, 16 W. R. 1,130 (1858).
(*f*) Story's Confl. Laws, s. 518.
(*g*) 10 H. L. C. 8 (1862).

granted, and to clothe the Russian executors with ancillary letters probate to enable them to get possession of that personal estate which in fact, though not in law, was situate in England.

In a later case (*h*) in which a grant of letters probate had been made in the State of Delaware, and the party who obtained it applied to the Court of Probate in England for a grant to enable him to get possession of the assets of the deceased in England, Lord Penzance said: "I have before acted on the general principle that where the Court of the country of the domicil of the deceased makes a grant to a party who then comes to this Court, and satisfies it that by the proper authority of his own country he has been authorized to administer the estate of the deceased, I ought, without further consideration, to grant power to that person to administer the English assets." The grant made in the country of the domicil is acknowledged as the basis of the grant in England.

In each of the cases mentioned a will had been made, and executors appointed. But in cases of intestacy, also, Probate Courts act upon the general rule above referred to in making the ancillary grant to the person who has obtained the primary grant (*i*); unless by so doing the Court would be acting in contradiction to the law of the country in which it is established (*j*).

An exception to the rule referred to arises where the primary administration has been granted to a creditor. In that case the Court in making the ancillary grant does not necessarily commit the administration to the party appointed by the Court of the domicil, as the appointment of a creditor is not of right, but one resting in the discretion of the Judge who appoints (*k*).

(*h*) *Hill*, L. R. 2 P & D. 90, (1870).

(*i*) *Weaver*, 36 L. J., P. & M. 41, (1865); *Beggia*, 1 Add. 340. *Gentilli*, *sup.*; *David Rogerson*, 2 Curt. 656; 2 Kent's Com. 429 *n* (6); Wharton's Confl. Laws § 608.

(*j*) *H.R.H. the Duchess of Orleans*, 1 Sw. & Tr. 253; *Weaver*, *sup.*; but see *Re Countess da Cunha*, 1 Hagg. 237.

(*k*) *In re O'Brien*, 3 O. R. 329; *Re Williams*, 5 Demarest (N. Y. Surr.) 292.

Ancillary grants are made not only in aid of probates and administrations taken out in foreign countries, strictly so called, but also in aid of grants made in different provinces or states of the same general government (*l*). Although as between England and the colonies or plantations before the abolition of the jurisdiction of the Ecclesiastical Courts as to probates and administrations, ancillary grants would not be necessary in the plantations if the primary grant were a prerogative grant. In 1707, Attorney-General Sir E. Northey advised the Lords Commissioners for trade in the plantations (*m*) that where a man died intestate in the plantations, having personal estate there, and also any personal estate, or debts owing, in England, the right of granting administration belonged to the Archbishop of Canterbury, and if an administrator were appointed in the plantation, which might be, that administrator would be accountable to the administrator in England; and that where letters of administration arrived at the plantation under the seal of the Prerogative Court of Canterbury they were to be allowed there, and the authority of the administration granted in the plantation from that time ceased. And in 1842, Tindal, C.J., considered it well established that in the case of a British subject dying intestate in the colonies, or in a foreign country, a prerogative administration extended to all the personal property of the intestate wherever situate at the time of his death (*n*). The principle of all prerogative probates appears to have been the saving of the necessity of two grants (*o*).

Notwithstanding the extended operation of prerogative grants referred to, it has been the practice in this Province since the establishment of Courts having probate jurisdiction to make ancillary grants upon the principles and according to the practice above stated as prevailing in England.

(*l*) *Earl*, L. R. 1 P. & D. 450; Throop's N. Y. Code, ss. 2695-6; Story's Confl. Laws, 7th edition, 513, *et seq.*

(*m*) Forsyth's Constitutional Law, 43.

(*n*) *Whyte* v. *Rose*, 3 Q. B. 493, 507.

(*o*) *Scarth* v. *The Bishop of London*, 1 Hagg. 625 at p. 633.

The grants of the former Court of Probate for Upper Canada upon which was conferred a jurisdiction over the whole province appears to have been on the same principle; the Act providing that—"when a testator or intestate died possessed of goods, chattels or credits to the amount of £5, in any district other than that in which he resided at the time of his decease, or possessed of goods to the value of five pounds in two or more several districts within the Province, the probate of such will or letters of administration of the goods and effects of such person should be granted by the Court of Probate only and not by any Surrogate Court" (*p*); the jurisdiction thus resembling that of the Prerogative Court of Canterbury to which the granting of probates and administrations, when there were *bona notabilia* in two or more dioceses, appertained, to the exclusion of diocesan or other local jurisdictions (*q*). By enabling Surrogate Courts to issue probates and administrations which should have effect throughout the Province, and abolishing the Court of Probate, which was done by the Surrogate Courts Act, 1858, the principle before alluded to was preserved and the procedure simplified.

In certain States of the United States, which for certain purposes are considered foreign to each other, express statutory provision is made as to ancillary grants not only of probates and letters of administration, but also of letters of guardianship of infants (*r*); the procedure being similiar as to evidence required, and the nature of the grant to that heretofore existing in this Province, and therefore more elaborate than that provided by the Imperial Statutes of 1857-8, which have been followed by the Ontario Legislature in its recent Act on the subject.

In the years just mentioned the law in England was amended for the purpose of making English grants operative in Ireland, and Irish grants operative in England,

(*p*) Nickall's Stats., U. C., (1831), c. 8, s. 3.

(*q*) *Scarth* v. *Bishop of London*, sup., and note to p. 637 *ib.*, cit. 92 nd Canon, x., Wms. on Ex., Ed. of 1832, p. 167.

(*r*) Throop's N. Y. Code, (1886), s. 2695-6; Smith's Probate Prac., (Mass.) 66; Story's Confl. Laws, 7th Ed. s. 513 *et seq.*

with similar provisions as to Scotch Confirmation. This was accomplished by "The Probate and Letters of Administration Act (*Ireland*), 1857," 21 & 22 Vict. cap. 79, s. 95, Imp.; and "An Act to amend the Law relating to the Confirmation of Executors in Scotland, and to extend over all parts of the United Kingdon the effect of such Confirmation, and of Grants of Probate and Administration," (1858.) Section 95, of the first named Act, is as follows:— "When any Probate or Letters of Administration to be granted by the Court of Probate in *Ireland*, shall be produced to, and a copy thereof deposited with the Registrar of the Court of Probate in *England*, such Probate or Letters of Administration shall be sealed with the seal of the last mentioned Court, and being duly stamped shall be of the like force and effect and have the same operation in England as if it had been originally granted by the Court of Probate in England." Section 12 of the secondly named Act is that, "When any confirmation of the executor of a person who shall * * be found to have died domiciled in *Scotland*, which includes, besides the personal estate situated in *Scotland*, also personal estate situated in *England*, shall be produced in the principal Court of Probate in England, and a copy thereof deposited with the Registrar together with a certified copy of the interlocutor of the commissary finding that such person died domiciled in Scotland, such confirmation shall be sealed with the seal of the said court and returned to the person producing the same, and shall thereafter have the like force and effect in England as if a probate or letters of administration, as the case may be, had been granted by the said Court of Probate." And an affidavit and inventory are to be filed stating the whole of the personal and movable estate and effects in the United Kingdom.

The provision of the first named Act (sec. 95), substituting sealing of the primary grant for the ancillary grant formerly in use has been adopted by the Legislature of this Province in its Act of last session, entitled "An Act respecting Ancillary Probates and Letters of Administration," the first section of which provides that, "Where any

Probate or Letters of Administration, or other legal document purporting to be of the same nature, granted by a court of competent jurisdiction in the United Kingdom, or in any Province of the Dominion, or in any other British Province, is produced to, and a copy thereof deposited with the Registrar of any Surrogate Court of this Province, and the prescribed fees are paid to the Surrogate Court as on a grant of Probate or Administration, the Probate, or Letters of Administration or other document aforesaid, shall be sealed with the seal of the Surrogate Court, and shall thereupon be of the like force and effect in Ontario, as respects personal estate only, as if the same had been originally granted by the said Surrogate Court of this Province, and shall (so far as regards this Province) be subject to any orders of the last mentioned Court, or on appeal therefrom, as if the Probate or Letters of Administration had been granted thereby." There is also a provision as to security in cases of administration of the estate of intestates, where letters are presented for resealing. And the Act is not to go into force as relates to the United Kingdom or any Province other than the Provinces and Territories of the Dominion, until a day to be named by Proclamation.

ALFRED HOWELL.

TORONTO, May, 1888.

PAGAN MARRIAGES.

A curious case as to the validity of a Pagan marriage appears in the Weekly Notes of 25th of February last, which is chiefly interesting to us because the facts agree almost exactly with those of a similar case in Canada, though the decision in the Canadian case was the exact opposite of that noted in the English case.

Re Bethell is the English case. It appeared that W. F. B. devised an estate to trustees in trust for C. B., his son, for life, and in case he should die leaving a child or children, to sell the estate, and hold the proceeds for such child or children; and if no child, then over to W. B. C. B. went to South Africa, and resided there, and never returned to England, and while resident there went through the form of marriage according to the custom of the Baralong Tribe with Teepoo, a Baralong girl, and had issue—a daughter, and the question was whether this child was entitled.

The marriage ceremony was that, when the consent of the parents had been obtained, the bridegroom slaughtered certain animals, the heads of which were taken to the bride's parents, and they were then considered married. It was found that the domicil of C. B. was English; that the Baralongs had not any religion or religious customs, and that polygamy was allowed. Stirling, J., held that a union formed between a man and a woman in a foreign country, although it might there bear the name of a marriage, and the parties to it might there be designated husband and wife, was not a valid marriage according to the laws of England, unless it was formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman, to the exclusion of all others." Further, that the evidence proved that C. B. intended that the relationship between himself and Teepoo should be that of husband

and wife in the sense in which those terms were used among the Baralongs; but the Baralong husband was at liberty to take more than one wife; and upon the evidence the union between C. B. and Teepoo was a marriage in the Baralong sense. It appeared that C. B. positively refused to marry Teepoo in church, not because of any difficulty in finding a place of religious worship where the ceremony could be performed, but because he alleged that he was a Baralong, and wished to marry according to their custom.

There are two points which are very prominent in this case. First, the domicil of C. B., according to the finding of fact, was English; secondly, C. B. refused to marry according to the rites of Christendom, alleging that he was a Baralong. For want of a better report of the case, it is difficult to see how these findings can subsist together.

From *Warrender* v. *Warrender* (*a*) from which we shall cite presently, and indeed from numberless other cases the question of domicil is a question of fact, and enters largely into the determination of the marriage rights and incidents. Or it is a question partly of fact and partly of intention. Professor Dicey's 7th Rule is as follows: "Every independent person can acquire a domicil of choice by the combination of residence (*factum*) and intention of permanent or indefinite residence (*animus manendi*), but not otherwise." His 16th Rule is as follows: "Any circumstance may be proof or evidence of domicil which is evidence either of the person's residence (*factum*), or of his intention to reside permanently (*animus manendi*) within a particular country."

In the case before us we have the finding of fact that C. B.'s domicil was English. This involves the finding that it was the intention of C. B. to return to England, or what is the identical proposition, that he did not intend to remain amongst the Baralongs. That being so he must have had in contemplation the intention to marry, so that he might live as an Englishman and for English purposes. Lord Brougham's remarks in *Warrender* v. *Warrender* are

(*a*) 2 Cl. & F. 488.

exactly in point here. It appeared in that case that the husband was a domiciled Scotchman, and married in England an Englishwoman who had never before her marriage been in Scotland. The jurisdiction of the Scottish court to pronounce a sentence of divorce at the suit of the husband was questioned, as the wife was at the time living apart from her husband on the Continent, under a deed of separation. His Lordship said (at p. 535), "Hitherto we have been considering the contract as to its nature and solemnities, and examining how far, being English, and entered into with reference only to England, it could be dissolved by a Scotch sentence of divorce. But the circumstance of parties belonging to one country marrying in another (which is the case before us) presents the question in another light. In personal contracts much depends upon the parties having regard to the country where it is to be acted under, and to receive its execution; upon their making the contract, with a view to its execution in that country. The marriage contract is emphatically one which parties make with an immediate view to the usual place of their residence. An Englishman, marrying in Turkey, contracts a marriage of an English kind, that is excluding plurality of wives, because he is an Englishman, and only residing in Turkey and under the Mahometan law accidentally and temporarily, and because he marries with a view of being a married man and having a wife in England and for English purposes; consequently the incidents and effects, nay, the very nature and essence (to use the language of the appellant's argument) must be ascertained by the English, and not by the Turkish, law. * * The Scotch parties, looking to residence and rights in Scotland, may be held to regard the nature and incidents and consequences of the contract according to the law of that country, their home; a connexion formed for cohabitation, for mutual comfort, protection and endearment, appears to be a contract having a most peculiar reference to the contemplated residence of the wedded pair; the home where they are to fulfil their mutual promises and perform those duties which were the objects of the union; in a

word, their domicil." These remarks are very apposite to the case in question, especially on account of the reference to a domiciled Englishman marrying in Turkey where polygamy is allowed. It will be observed that, although the nature and essence of the marriage contract in the hypothetical case put by Lord Brougham, is founded upon a presumption, the presumption is one that incontestably flows from the fact of domicil. In *Warrender* v. *Warrender* the husband, though a domiciled Scotchman, resided for a great portion of his time in England and was not often or for a great length of time in Scotland. Nevertheless, the domicil remained Scotch, and the various rights or incidents of the marriage, its nature or essence, were determined by the presumption that a Scotch marriage was intended because the domicil was Scotch.

So, in *Re Bethell*, if the holding was correct that C. B.'s domicil was English, notwithstanding his residence in South Africa, it would seem that this holding involved the holding that his intention was to marry and live as an Englishman in an English home, though his marriage was not followed by an actual return to, and residence in England. Does then the performance of the marriage ceremony in a country where polygamy is allowed destroy this presumption? The mere fact of such a marriage cannot raise a presumption of intended polygamy. The same act of marriage cannot raise contrary presumptions. If the marriage of a domiciled Englishman in Turkey raises the presumption that he intends to contract an English marriage, it cannot by any possibility at the same time destroy that presumption by raising the contrary presumption, that he intends to contract a marriage with a view to residence in Turkey and future polygamous connexions.

Again, why should a presumption that C. B. intended to enter into future polygamous connections prevail against the fact that he did not do so? His intentions must be divined from his acts, and his act of remaining with one wife until his death should rebut the presumption that, because he married where polygamy was allowed, therefore he intended a polygamous connexion. And even if the

intention existed in fact, would its existence not followed by, or even if followed by, subsequently polygamous connexions destroy the validity of the first marriage for the purpose of determining rights of property. The domicil of the wife being that of the husband, the consummation of the marriage makes the consorts man and wife, according to the law of the domicil.

Again, the ceremony being a ceremony of marriage, its validity is recognized wherever the marriage is called in question. Thus, says Lord Brougham (*b*), "A marriage, good by the laws of one country, is held good in all others where the question of its validity may arise. For the question always must be, did the parties intend to contract marriage? And if they did that which in the place they were in is deemed a marriage, they cannot reasonably or sensibly or safely be considered otherwise than as intending a marriage contract. The laws of each nation lay down the forms and solemnities, a compliance with which shall be deemed the only criterion of the intention to enter into the contract."

It may be urged, however, that where a marriage takes place in a country where polygamy is allowed, the ceremony of taking a wife is not the ceremony of marriage as understood in Christendom, but the mere ceremony of taking one of several women for the procreation of children. The object of marriage being, as the ordained service of the Established Church of England has it, the procreation of children, a Christian marriage differs in nothing save in the restriction of the husband to one wife. As long as the fact exists that the husband takes and keeps but one wife to the exclusion of all others, his intention can matter nothing. A man may marry in a Christian country with the express intention of committing bigamy when the opportunity occurs, or with the intention of having the marriage tie dissolved as soon as possible, and yet this marriage is good if the ceremony is performed. The liberty to leave a woman without cause and without cere-

(*b*) *Warrender* v. *Warrender*, 2 Cl. & F. at p. 531.

mony, differs only in degree from the liberty to leave for cause and with ceremony. The intention to create cause and resort to the ceremony of dissolution as soon as possible after consummation of marriage, does not render the marriage void. The *factum* of marriage, or the union of one man with one woman being established, is the intention as to future conduct material? Subsequent unions, standing the first, in pursuance of previous intentions, cannot invalidate the first union. In Christendom, they are punishable, but not in a pagan country—that is the difference.

We have so far pointed to the conclusion that if the domicil were really English, the marriage, though performed in a foreign country, should have been presumed to be English in its nature and future relations. But it is difficult to see how the finding as to the domicil consists with the evidence upon which the marriage was found to be invalid, namely, that C. B. was married according to the Baralong custom, because he alleged he was a Baralong. The finding as to the English domicil is based upon a presumed intention to return to England, or rather the domicil which was English is not altered unless it can be shown that C. B. resided and intended to reside in Bechuanaland, and this intention seems clearly made out when it is held that his marriage was void because he married and intended to marry as a Baralong. His allegation that he was a Baralong, and insistence upon following the customs of the tribe seem to displace any intention to remain an Englishman or return to England, and consequently to establish an intention of remaining in South Africa, or at any rate remaining what he alleged he was, a Baralong. If that be so, the question is reduced to this, whether union with one woman where polygamy is allowed is marriage? The difficulty that pluralty of wives raises is chiefly, if not altogether, with regard to the determination of the matrimonial rights and relations. In *Hyde* v. *Hyde and Woodmansee* (*c*), Lord Penzance said, with reference to a mormon mar-

(*c*) L. R. 1 P. D. 130.

riage: "Now, it is obvious that the matrimonial law of this country is adapted to the Christian marriage, and it is wholly inapplicable to polygamy. The matrimonial law is correspondent to the rights and obligations which the contract of marriage has, by the common understanding of the parties created. Thus conjugal treatment may be enforced by a decree for restitution of conjugal rights. Adultery by either party gives a right to the other of judicial separation; that of the wife gives a right to a divorce, and that of the husband, if coupled with bigamy, is followed by the same penalty. Personal violence, open concubinage or debauchery in face of the wife, her degradation in the home from social equality with the husband, and her displacement as the head of her household, are with us matrimonial offences, for they violate the vows of wedlock. A wife thus injured, may claim a judicial separation and a permanent support from the husband under the name of alimony, at the rate of about one-third of his income. If these and the like provisions and remedies were applied to polygamous unions, the Court would be creating conjugal duties, not enforcing them, and furnishing remedies where there was no offence. For it would be quite unjust and almost absurd to visit a man who, among a polygamous community, had married two women, with divorce from the first woman, on the ground that, in our view of marriage, his conduct amounted to adultery coupled with bigamy." While refusing to interfere with the parties on a petition for divorce, the wife having married again in Utah Territory, his Lordship expressly excepted the question of property rights from his consideration. At page 138, he says: "This Court does not profess to decide upon the rights of succession or legitimacy which it might be proper to accord to the issue of polygamous unions, nor upon the rights or obligations in relation to third parties, which people living under the sanction of such unions may have created for themselves." Full consideration was given in this case to the question as to the intention of the parties in entering into such a union in a country where polygamy is allowed—as to the nature of

the contract, and whether "marriage" in such a country is not something different from marriage in Christendom, and the consideration led up to the definition of a Christian marriage as "the voluntary union for life of one man and one woman to the exclusion of all others." It must be borne in mind, however, that the judgment is tending towards the impossibility of determining matrimonial rights, notably for the cause of adultery under the garb of a second marriage, when the very contract of union included liberty to form a second union of a similar sort; and the application of the argument to a question of property rights is excluded.

The same question was debated by Lord Brougham in *Warrender* v. *Warrender* (*d*), and it is put thus strongly: "If indeed there go two things under one and the same name in different countries, if that which is called marriage is of a different nature in each, there may be some room for holding that we are to consider the thing to which the parties have bound themselves according to its legal acceptance in the country which the obligation was contracted. But marriage is one and the same thing substantially all the Christian world over. Our whole law of marriage assumes this; and it is important to observe that we regard it as a wholly different thing, a different *status*, from Turkish or other marriages among infidel nations, *because we clearly never should recognize the plurality of wives, and consequent validity of second marriages, standing the first*, which second marriages the laws of those countries authorize and validate." This case was, however, a case of a petition for a divorce, and directed to the matrimonial relations of the parties. It will be observed also that while his Lordship is quite prepared to hold, that a Turkish marriage is something different from a Christian marriage, the reason given is that we could not recognize the validity of the second marriage, liberty to enter into which must of necessity be involved in and be part of the contract of union with the first wife under a system of law

(*d*) 2 Cl. & F. At p. 531.

which allows polygamy. Nothing is said as to the invalidity of the first union, and indeed from the mode of expression used we might almost infer that the length to which his Lordship would have gone in a property case would have been to hold the second marriage only void.

The Canadian case is *Connolly* v. *Woolrich* (*e*). The facts were that William Connolly, who was domiciled at Lachine, Lower Canada, went to the North-west Territories as an employé of the North-west Company, and at the age of seventeen took as his wife, according to the custom of the Cree Indians, an Indian girl named Susanne. The ceremony of marriage is described by a priest, who was examined as a witness, as follows:—"L' époux offrait aux parents de l'épouse des présents ; quand les présents étaient acceptés ils donnaient en mariage leur fille à l'époux qui la prenait alors comme femme." Another witness, Fanny Boucher, gave evidence of a much more simple ceremony. Her evidence was, " J'étais moi-même mariée dans le nord-ouest. Le façon et qu'on couche avec les hommes. Je ne sais pas si on est obligé de faire des présents pour se marier." The majority of the witnesses, however, seemed to think that there should be a purchase of the squaw by giving presents, and that view agrees with historical accounts. There were no priests or clergymen in the country at the time, and polygamy was allowed and sometimes practised amongst the Indians, though the whites who thus married Indian women did not practise it. They remained faithful to their squaws. It was considered a disgrace for a squaw to live with a man unless he took her as a wife, that is with consent of her parents after giving presents, and some of the witnesses thought that a squaw who brought this disgrace upon her family would have been killed by her brothers.

Connolly lived with Susanne as his wife for about thirty years, and she was known as Susanne Connolly, wife of William Connolly, in the North-west. When he returned to Lower Canada, Connolly had two of his daughters bap-

(*e*) 11 L. C. Jur. 197 ; in appeal, 1 Rev. Leg. 263.

tized by a priest as his children. The plaintiff, his eldest son, was also baptized, but the baptismal certificate falsely stated that his parents were unknown (*dout les parents légitimes nôus sont inconnus*). Connolly was himself a witness to this certificate. Susanne was known for a time in Lower Canada as Mrs. Connolly. It was proved that Connolly had said that when he returned to Lower Canada he intended to marry Susanne (that is, in the face of the church), and the belief was expressed by several persons that he would have done so had he not met Julia Woolrich. After remaining in Lower Canada for some time he went through the ceremony of marriage according to the rites of the Roman Catholic Church with Julia Woolrich, and had a second family. Both Connolly and Susanne having died, the plaintiff sued Julia Woolrich for his share of his mother's inheritance, alleging the marriage of his mother, her community of property with his father, Wm. Connolly, and inability of his father to dispose of more than a moiety by will. It was held by Monk, J., and affirmed on appeal, Loranger, J., dissenting, that the Indian marriage was valid. Mackay, J., at page 390 of the report in appeal, declines to be bound by what took place after the first marriage, notwithstanding that Connolly might have contracted polygamous unions in the North-west, subject only to his incurring the displeasure of the officers of the North-west Company (*f*), for which position he cites authority; and again, he says, "as to polygamy and divorce, the law of Lower Canada is this: our law refuses polygamy, and therefore our courts must refuse rights to polygamous marriages (in so far as polygamous), although permitted by the laws of the married person's country or domicil: *Savigny*, by Guthrie, p. 36; foot of p. 121, and note to p. 265." Connolly had never abandoned his domicil of origin, and his Indian wife and children enjoyed, in the North-west and in Lower Canada, all the rights which flowed from a Lower Canadian marriage, the ceremony only of which was had according to an Indian custom.

(*f*) It was in evidence, however, that the chief factor had an Indian wife at each of the posts which he was in the habit of visiting.

The case is full of interest both on the question of the marriage, and on account of the historical matter contained in it. It was alleged that the country belonged to England, and that the common law was in force there, both of which points were discussed. It will be observed, however, that the fact of Connolly's domicil governed the question as to community of property.

EDITORIAL REVIEW.

The Proposed Law School.

The matter of the proposed Law School has been before Convocation, and a committee appointed by that body to consider it has passed some resolutions. These will, it is understood, be again submitted to the committee, to the meetings of which delegates from the County Law Associations have been invited.

On 16th April the following resolution was adopted by Convocation :—

"*Resolved*, That the whole question of Legal Education be referred to a special committee to report to Convocation at as early a day as practicable, and that the further consideration of the report of the committee on a scheme for the establishment and maintenance of a Law Faculty be deferred until after the committee appointed by this resolution shall have made its report; the committee to be asked to consider the present scheme and any other which may be presented as well as the following:

1. Whether or not, it is desirable to enter into any arrangement with any University for the joint education of students.

2. Whether or not, it is desirable in any such scheme to shorten in any way the period of study or service of students.

3. And whether or not, it is desirable that the Law Society should aid in establishing branches of the Law School in other centres than Toronto, by lectures to be delivered either under the direction of Local Bar Associations, or of any University domiciled in such centre, the attendance on such lectures where established to be compulsory."

The following Special Committee was appointed: The Hon. Sir Adam Wilson, Messrs. Moss, S. H. Blake, Irving, Mackelcan, Robinson, McCarthy, Osler, Bruce, Meredith, Maclennan, Murray, Hardy, Foy, Lash, Martin, Shepley, Purdom, Britton, Hudspeth and Fraser.

The Committee met on 30th April, and made the following proposal for consideration, on motion of Mr. Irving, Q.C., seconded by Mr. Mackelcan, Q.C.:—

"(1) That it is not desirable to enter into any arrangement with any University for the joint education of students, nor to shorten in any way the period of study or service of students.

"(2) That it is expedient to reorganize the Law School by appointing a President who shall have the supervision and general direction of the School and be responsible for everything in connection therewith. Lectures shall be delivered in Toronto and in other places where Lectures under authority of the Law Society shall be established.

"(3) That a sufficient staff of Lecturers shall be appointed who shall be under the control of the President, and who shall give a complete course of lectures in Toronto between the 1st October and the 1st May, and also a complete course in such other cities as the Law Society may direct. The Lectures shall extend over two terms of weeks each. In cities other than Toronto it must be shewn that a sufficient number of students are resident in such city or vicinity as to warrant the establishment of lectures therein. The fees for each course of lectures shall be $.

"(4) That all students residing or studying in Toronto, or in cities where lectures are established shall be obliged to attend at least three courses of lectures before being called to the Bar, but that this requirement shall not extend to students who before coming up for call shall have taken the degree of Bachelor of Laws, or Bachelor of Arts."

On 14th May, a further meeting of the Committee was held at which clause (1) of the above proposals was amended

by inserting "at present" between the words "not" and "desirable." Clause (2) was struck out and the following substituted therefor:—

"That it is expedient to continue and re-organize the Law School and to appoint a President who shall have the supervision and general direction of the school. Improved legal education for students-at-law and articled clerks shall be provided for by the delivery of lectures and otherwise in Toronto and such other cities as may be directed by Convocation."

Upon the discussion of clauses (3) and (4) of the proposals it was moved by Mr. Fraser, seconded by Mr. Mackelcan, and carried on a division,

"That the following be substituted for sections 3 and 4:

That in the opinion of this Committee, one of the first duties of the President of the Law School should be the submission to Convocation (and for its consideration and approval) of a complete scheme of the machinery for such proposed legal education but in the opinion of your Committee any such scheme should embrace,

(I). The appointment of a sufficient staff of lecturers.

(II). The delivery of a course of lectures in each year in Toronto and such other cities as may be deemed advisable.

(III). The fees if any to be paid in respect of such lectures.

(IV.) The compulsory attendance at such lectures of students-at-law and articled clerks resident in the cities where the same are delivered.

(V). The passing of special examinations by all students and clerks upon whom attendance at such lectures may be made compulsory."

It was then moved by Mr. Irving, seconded by Mr. Fraser, and carried,

"That in the opinion of this Committee the President of the Law School should be a Barrister-at-Law of at least

seven years standing, and that his yearly salary should be not less than three thousand dollars."

It was then moved by Mr. Fraser, seconded by Mr. Murray, and carried,

"That the compulsory attendance shall be for the courses of lectures delivered during the period of at least three years, unless the student or clerk is only resident in the city where lectures are delivered for a period of less than three years, and in any such last mentioned case the compulsory attendance at lectures shall be obligatory only as to such lectures as may be delivered during the actual period of residence."

In was then moved by Mr. Murray, seconded by Mr. Shepley, and carried,

"That in the event of the proposed reorganization of the Law School, your Committee would recommend that the Primary, Intermediate and Final Examinations of the Law Society shall be held twice during each year instead of four times as at present; that is to say in the month of May and the month of November in each year."

Notice has been given that the following points will also be considered:

1. The general scheme for improved legal education.

2. The question of the compulsory attendance by every student at the lectures and other methods of instruction to be adopted, without reference to his residence.

3. Shall there be one school established in Toronto, or shall there be branch schools, and if so, in what places?

4. Should a Sub-committee be sent to the Law Schools at Harvard, Ann Arbor, and other centres before any scheme is adopted.

5. The question of the fusion of the professions of Barrister and Solicitor, and the establishment of a uniform standard of education and service for admission to the practice of law in both branches.

6. Shall there be any change in the present system?

The meeting then adjourned till Tuesday, the 22nd of May instant at 2 p.m., and the Secretary was directed to

send a copy of the resolution of 15th April last, and of these minutes, to each County Law Association, and request them to send one representative to confer with this Committee on the said day, and also a copy of these minutes to each member of this Committee.

The meeting of the 22nd of May was further adjourned in order to allow of the consideration of the matter by the County Law Associations.

Fiat Justitia, ruat cœlum.

It is said that Mr. Justice Chitty made this remark when the plaster came rattling down on his desk from the ceiling of his court room. It appears that the Royal Courts of Justice have been badly built, or rather that the timber used in the construction was green, and from rapid shrinkage has endangered the stability of the interior and the lives of those engaged therein. The *Law Journal* says, "The only hope of the handiwork of Mr. Robert Lowe and Mr. Ayrton is that it will not last. Already the floors of the corridors are wearing away, forming traps to hurrying feet, stones of unequal friability having been cunningly put alternately, and flights of dip and rise in succession provided." The real remedy is said to be to pull the building down and build anew.

The Middlesex Grand Jury.

The Middlesex (Ontario) Grand Jury made the usual presentment to the Court at the close of their duties at the last Assizes. We extract a passage, which, instead of exciting sympathy or pity, should induce the Attorney-General to institute a searching enquiry. Here is the passage:—"We have to thank the Crown Counsel for his able assistance to us in the performance of our duties, many of which were of a very henious (*sic*) character."

Chief Justice Galt.

It is with great pleasure that we announce that the honour of Knighthood has been conferred upon Chief Justice Galt.

BOOK REVIEWS.

The Criminal Statute Law of the Dominion of Canada, relating to indictable offences with full text as revised in 1886, and put into force by Royal proclamation on the 1st day of March, 1887, and cases, notes, commentaries, forms, etc. By HENRI ELZEAR TASCHEREAU, one of the Judges of the Supreme Court of Canada. Second edition, revised, re-arranged and enlarged. Toronto: Carswell & Co., 1888.

This edition which contains the Statutes respecting crimes in their new form as revised and consolidated, will be welcome to all who have anything to do with the administration of criminal justice. For a long time Mr. Justice Taschereau's work has been a useful guide, and has been almost as frequently referred to as the English works. A very great number of new decisions have been included in this edition, together with some valuable notes by Mr. C. S. Greaves, Q.C., and increase largely its value over that of the first edition.

A Legal Hand-Book and Law List for the Dominion of Canada and a Book of Parliamentary and General Information. Prepared by LOUIS-H. TACHÉ, Advocate. Toronto: Carswell & Co. 1888.

This is by far the most ambitious compilation of official information that has yet been attempted in Canada. It includes information as to the Government of Great Britain and her dependencies, parliamentary statistics, census figures, and a variety of matter almost impossible to catalogue. The Courts of the various Provinces, names of Judges, Queen's Counsel and practising Barristers, Solictors, and Advocates occupy a large space, and the

names of Registrars and other officers are given. There are several indices, including a general index of names. The chief use of a book of this kind is to furnish *correct* information. While the compiler is certainly deserving of great praise for the work which he has done, we cannot help calling attention to the fact that errors do exist, chiefly in proof reading, but also in the substance of the work. These can easily be corrected in a subsequent edition, when the book will become the most useful of its kind that has yet been published in Canada.

The Bills of Sale and Chattel Mortgage Acts of the several Provinces of the Dominion of Canada; being a complete and exhaustive annotation of the Revised Statutes of Ontario, 1887, cap. 125, and of the Statutes of the Provinces of New Brunswick, Nova Scotia, Prince Edward Island, Manitoba and British Columbia, bearing upon the subject of mortgages and sales of personal property. Preceded by an introductory treatise on the law of bills of sale and chattel mortgages, etc., etc., together also with a carefully prepared and useful appendix of forms. By JOHN AUGUSTUS BARRON, of Osgoode Hall, Barrister-at-Law. Second edition. Toronto: Carswell & Co. 1888.

We have not transcribed the whole of the title page, but sufficient to show the contents of the book. We are glad to see that Mr. Barron recognizes the importance of paying attention to the laws of the other Provinces relating to bills of sale. It not unfrequently happens that clients in Ontario desire to know how they stand with relation to customers in other Provinces, and for want of a book such as this at hand much time is lost in searching for the statutes bearing upon such matters. Both in this respect and in the addition of numerous cases decided since the last edition the work is much improved. So useful has it been found that it needs nothing further to commend it to the profession.

Roman Law in English Jurisprudence, a thesis for the Degree of Doctor of Civil Law, in course, in McGill University. By JOHN J. MACLAREN, M.A., B.C.L. Toronto: William Briggs, 1888.

We have read this pamphlet with much interest. The notion of the prevalence of Roman law in equity doctrine is not novel, but it is here treated of in a concise and readable form, and in a broader and more general way, showing the extension of the influence of the Romans to the common law. The learned writer sums up as follows: "It is submitted that an impartial consideration of the question will lead to the conclusion that the law of England is much more largely indebted to the Roman law, and has embodied many more of its provisions than has been generally conceded by the admirers of the former, and that the following propositions are well founded:

"1. That a large portion of the English common law, generally supposed to be indigenous, is of Roman origin, having either survived from the Roman occupation, or having been subsequently introduced through the influence of the Church, or under the early Norman kings.

"2. That further additions were made by these Roman law elements in consequence of the revival of the study of civil law under Vacarius and his successors, and the incorporation by Bracton iuto his work of a considerable part of the *Corpus Juris*, either previously embodied in the common law or inserted by him as not being inconsistent with its provisions.

"3. That many of the principles of the civil law were adopted through the medium of the Court of Chancery, the Ecclesiastical Court, and the Court of Admiralty, where the civil law rules were either adopted or generally recognized as authorities.

"4. That even in the common law Courts the extension of the law to meet the requirements of advancing civilization, and particularly the development of modern mercantile law, were largely on civil law lines, through the adoption of the *lex mercatoria*, and the favour with which eminent

Judges, such as Lord Holt and Lord Mansfield, regarded the Roman law.

"5. That recent legislation, as for instance, the extension of the rules of equity by the Judicature Act, has infused the equitable principles of the civil law into the law of England."

Benjamin's Treatise on the Law of Sale of Personal Property, with references to the American decisions, and to the French Code and Civil Law. By J. P. BENJAMIN, Q.C., of Lincoln's Inn, Barrister-at-Law. From the latest English edition, with American notes entirely re-written. By Edmund H. Bennett, L.L.D., Dean of the Boston University Law School. Boston: Houghton, Mifflin & Co. The Riverside Press, 1888.

We might add that it also includes references to some Canadian cases which will be found in Mr. Bennett's notes. Benjamin's text is so well known that nothing remains to be said about it. But the new arrangement by the American notes makes this a decided and most welcome improvement on the previous edition. They are arranged in the form of a short treatise on its English matter at the end of each chapter, and thus we have the English text intact, and the additional benefit of the American notes. When notes become so voluminous as to amount to a concurrent or parallel treatise on the subject matter of the text, they should either be extended in the text or be placed as these are at the end of the chapter. The latter course is preferable where the notes are the production of an editor, and not the author.

A compendium of the Law of Torts, specially adapted for the use of students. By HUGH FRASER, M.A., LL.M., of the Inner Temple and western circuit, Barrister-at-Law; Lecturer on Common Law to the Liverpool and Newcastle upon Tyne Board of Legal Studies; Late Scholar and Law Student of Trinity Hall, Cambridge; formerly Common

But it is quite unnecessary for me to seek to establish what every one of your readers is fully aware of. The subject should attract the consideration of the Law Society and the County Law Associations and such steps taken in the premises as would give to the profession and the public a due amount of protection from irresponsible charlatans.

Yours, etc.,

W. N. I.

Toronto, April 23rd, 1888.

[It is not illegal for an unprofessional man to do conveyancing, and the practice is not without resulting benefits to the profession. A recent case occupied eight days in trial, and eight counsel were engaged at a very large cost. The whole difficulty arose out of an interlineation in a will, and the learned Judge who tried the case stated as one of the reasons for ordering costs to be paid out of the estate that the testator chose to employ an "irregular" conveyancer. In another matter, however, the profession are entitled to protection. A very great number of letters of administration and probate are applied for by unlicensed conveyancers. This is against the terms of the Solicitors' Act, and as the Law Society is apathetic where the interests of the profession at large are concerned, it is most probable that the County Law Associations will endeavour to have the evil remedied.—ED.]

REVIEW OF EXCHANGES.

Central Law Journal—16th September, 1887.

Perpetuating Testimony, by JAMES M. KERR. The bill lies to preserve testimony where the subject matter is likely to be litigated in the future, but cannot be made the subject of immediate judicial investigation, and there is testimony in existence which is in danger of being lost before the matter to which it relates can be brought to trial. No relief must be asked by the bill, and it will be demurrable unless it shows on its face that present relief could not be granted. The plaintiff must have some vested interest in the subject matter. The bill simply asks leave to examine witnesses to the intent that the testimony may be preserved, and is never brought to trial, the object being attained by taking the evidence. Numerous cases are cited.

Ibid.—23rd September, 1887.

Right to Hold an Extradited Prisoner for Another Crime, by EUGENE MCQUILLIN. The diplomatic view urged by Lord Derby in Winslow's case was that the receiving state should undertake to try the prisoner only for the crime specified. Both English and American writers endorse this view. There are authorities to the contrary, which rest on the ground that it is no defence to the charge or ground for discharge, though it may be a matter for complaint between the governments. The Supreme Court of the United States held, however, in Rauscher's case that the prisoner must be tried for the specified offence only.

Ibid.—30th September, 1887.

Time of Delivery of Goods by Common Carrier as Affected by Special Contract, by B. E. BLACK. A carrier at common law is bound to deliver the goods within a reasonable time, but where he makes a special contract to deliver at a prescribed time the reasonableness of time to deliver disappears as the parties have made their time certain. And in such a case, it is said, that the impossibility of complying with this term of the contract is no excuse for its non-fulfilment.

Compound Interest, by E. S. WHITTEMORE. Some English and American cases are cited.

Criminal Law Magazine.—September, 1887.

The Right of Argument, by SEYMOUR D. THOMPSON. This is a very exhaustive article dealing with the right to counsel, the various American provisions as to limiting the time of argument, the discretion

of the Court generally to limit counsel, the number of counsel to be employed, the manner in which they are to perform their functions, the right to begin and reply, the right to argue questions of law to the jury which seems to exist in some of the States, etc. Very many authorities are cited.

Law Journal.—21st May, 1887.

Negligence in the Lords. The case of *Wakelin* v. *L. & S. W. R. Co.*, 56 L. J. Rep. Q. B. 229, is the subject of some remarks dealing chiefly with the question whether the plaintiff in an action of negligence must negative contributory negligence in making his case. The remarks of the Master of the Rolls seeming to countenance the view that he must, it is shown that the plaintiff does not necessarily fail because the jury might on his evidence find for either party.

Ibid.—11th June, 1887.

Mr. Justice Kekewich on Restraint of Trade. A case of *Davies* v. *Davies*, 56 L. J. Ch. 481, is discussed. On a dissolution of partnership a covenant was entered into by the defendant not to trade so as to affect his late partners "so far as the law allows." In an action against him for breach of the covenant an injunction was granted to restrain him from trading in a particular street, and it was intimated that if he attempted to trade anywhere else in Middlesex he would be further enjoined. This decision is adversely criticized. "This view," it is said, "will hardly square with any estimate of the true function of the rule that absolute covenants in restraint of trade are not binding, nor even to the general rule of the operation of a prohibitive law on contracts. The decision appears to assume that a contract, the terms of which are clearly illegal, may be kept within bounds, and will be held good by a simple proviso that it is not to go further than the law allows. * * The real fact seems to be that clauses limiting the operation of words in a contract to what is legally permissible are pure surplusage."

THE

CANADIAN LAW TIMES.

JULY, 1888.

THE REMEDY AGAINST A PREFERRED CREDITOR.

THE remedy, if any, against a preferred creditor is one which depends upon the construction of the Act or Acts relating to assignments for the benefit of creditors and respecting the fraudulent preference of creditors by persons in insolvent circumstances. We mention both the Acts, referring to the original statutes rather than the Revised Statutes of 1887, partly because we have not yet become familiar with the new revision, and partly because it is not satisfactorily established that the recent Acts are valid, though we must at present defer to the state of the decisions upon their validity.

Notwithstanding anything that may be said respecting the details of the legislation in question, their one aim and object is to provide for a ratable and proportionate distribution of the assets of an insolvent amongst his creditors. The efforts of the Legislature are all directed to this positive result, though the legislation itself is negative to a great extent. It may be admitted that when the Legislature declares negatively that no creditor of an insolvent debtor shall obtain or retain a preference over another, or positively that all creditors of an insolvent debtor shall share in his assets ratably and proportionately, according to their claims, it is enunciating identical propositions and declaring them to be law. This depends not upon any

construction that may be placed upon the particular words of a statute, nor upon any principle of law peculiar to bankruptcy and insolvency, but upon a simple elementary principle of intelligence. If no creditor is to have more than another (sharing ratably of course), all must partake upon the same footing. Common sense, common logic, arithmetical computation, all lead to one and the same conclusion. By no human device can creditors be ranked upon an estate otherwise than ratably and proportionately, if the principle is adhered to that no one is to be preferred over another. And yet powerful and ingenious minds have accomplished this result, that, while the statute is in force declaring that a preference made to a creditor shall be void, which is in effect declaring that no creditor shall take a preference, a means has been found for confirming such a preference, by declaring that there is no remedy in certain cases when the preference has been obtained.

In discussing the construction of the Acts in question we shall adhere to the wording of chapter 118 of the Revised Statutes of Ontario, 1877, section 2. This statute is the mere transcript of a statute which was passed when the Provincial Legislature had undoubted power to pass it, and if it transpire eventually that the succeeding acts and amendments are not constitutional we shall be relegated to this enactment. The amending acts do not alter the principle of this enactment, and will not interfere with the validity of our argument, but we shall have occasion to refer to them also and to discuss their provisions, treating them as we are bound to do as in force.

The words of the Act in question, to which reference will be made, are as follows:—"In case any person, being at the time in insolvent circumstances, or unable to pay his debts in full, or knowing himself to be on the eve of insolvency, makes or causes to be made any gift, conveyance, assignment or transfer of any of his goods, chattels or effects, or delivers or makes over, or causes to be delivered or made over, any bills, bonds, notes or other

securities, or property, with intent * * * to give one or more of the creditors of such person a preference over his other creditors, or over any one or more of such creditors, every such gift, conveyance, assignment, transfer or delivery shall be null and void as against the creditors of such person * * *." The amending Act, which declares that any such assignment or conveyance which has the effect of preferring one creditor over another shall be utterly void as against other creditors, does not differ in the principle of the law, but extends its operation to some transactions which would not fall within the original Act. Reverting to our opening remarks, this is identical with declaring that all creditors of an insolvent person shall share ratably. Perhaps this will not be denied; but when the Courts have been called upon to produce that result they have in certain cases declared it to be unattainable.

In *Davis* v. *Wickson* (*a*) it was held that when one creditor, who had obtained property from his debtor in fraud of other creditors, had realized the property and turned it into proceeds which could not be ear-marked, the defrauded creditors could not make the preferred creditor account. And it was said that the only remedy was that provided by the 13 Eliz. cap. 5, which gives an action for the value of the goods whereof half shall go to the Crown and half to the party aggrieved. And in *Stuart* v. *Tremain* (*b*) it was held that the remedy under the statute is to have removed any obstruction to execution which may exist, and therefore that where the preferred creditor has parted with the property to a *bona fide* purchaser for value, against whom the defrauded creditor cannot proceed, there is no remedy, save that provided by the Statute of Elizabeth.

It is clear that under these cases a very easy means of obtaining a preference has been provided by judicial decision in the teeth of the statute. The creditor who desires to procure a preference has only to make provision for dis-

(*a*) 1 Ont. R. 369.
(*b*) 3 Ont. R. 190.

posing of the property when it reaches his hands, and once he has made a disposition his unlawful act in procuring a preference for himself becomes a lawful one in that he is not accountable for what he has received. There is in such a case no necessity to conceal the mode by which a preference is gained. The offence against the statute may be open and flagrant, for the preferred creditor can quickly and effectually deprive the other creditors of their remedy. We have arrived at this conclusion then, that while the statute declares that one creditor shall not obtain a preference over the others, judicial interpretation has provided a means whereby he shall. We shall endeavour to show that this position cannot be sustained.

In *Davis* v. *Wickson* it was said, "The redress sought is specifically wrong. The right of the plaintiff in this class of cases is to have any impediment removed or declared invalid which intercepts the action of his writs of execution. So long as the property of his execution debtor remains distinguishable, and so long as no purchaser for value without notice intervenes, so long may the court award relief against that property in the hands of fraudulent or voluntary holders. But where, as here, the first holder sells the property obtained from the debtor and receives the proceeds in a shape that cannot be ear-marked, there is no jurisdiction to go beyond the further remedy which the statute of Elizabeth prescribes, namely, that all parties to fraudulent conveyances aliening or assigning thereunder shall forfeit a year's value of the lands, and the whole value of the goods, whereof half shall go to the Crown and half to the party aggrieved, to be recovered by action of debt as maintained in section 2 of the Act." If there is a fallacy in this reasoning, it lies, first, in applying the special remedy provided by the statute of Elizabeth for offences against its provisions to the Ontario Act, which is essentially different in providing against preferences; and, secondly, in assuming that the right of the aggrieved creditor is to have the impediment to his execution removed, or in other words, to follow the specific property assigned. With respect to the first point, we take exception to the

application of the remedy provided by the statute of Elizabeth, because with respect to preferences the Provincial Statute differs radically from the statute of Elizabeth. In *Gottwalls* v. *Mullholland* (*c*), the distinction between the Provincial Statute and the statute of Elizabeth was pointed out, and this decision has been acquiesced in for a long time, if indeed acquiescence in so plain a distinction is of any consequence. Sir Adam Wilson there said (*d*), "Both Statutes expressly avoid all transfers of property made to the end, purpose and intent, to delay, hinder or defraud creditors, making therefore the intent the prohibited act or purpose. Our statute prohibits also every such transfer which is made with the intent of giving a preference to one creditor over another. Excepting in this respect, the two statutes appear to be substantially alike in their general provisions." The distinction then is that a preference under the Statute of Elizabeth is lawful, under our statute, unlawful. If our statute had not prohibited preferences it would have been substantially the same as the Statute of Elizabeth, and thus no change would have been made by its passage, for the Statute of Elizabeth was already in force. Taking our statute as it stands, however, and assuming that in all other respects than as regards preferences, it is merely declaratory of what the law was previously, we are justified in saying that the only original provision which it contains is the prohibition of preferences. What warrant, then, is there for applying to this enactment the remedy provided by the Statute of Elizabeth for another offence altogether? If this provision against preferences had of itself comprised an Act, there would have been nothing whatever to connect it with the Statute of Elizabeth, and no warrant would have existed for applying to it the remedy provided by that statute. Standing as it does in the same act which makes similar provisions to those of the Statute of Elizabeth does not improve the position. For it is quite plain

(*c*) 15 C. P. 62; affirmed, 3 E. & A. 194.

(*d*) At p. 67.

that if a preference is good under the Statute of Elizabeth it is no offence against that statute, and therefore the remedy provided by that Statute was never intended to apply to preferences. Assume for a moment that an aggrieved creditor brings an action for the value of the goods transferred to a favoured creditor, and lays his action upon the Statute of Elizabeth for the penalty. The plain answer would be, a preference is not within the Statute of Elizabeth, and therefore no action for the penalty will lie.

Nor is there any ground that one can readily perceive for importing into our law as a remedy for offences against our statute that particular remedy provided by the English Statute. It is neither a suitable nor a workable remedy. The preferred creditor would, under such proceedings, be bound to give up the whole value of the goods, whereas the statute merely says he shall not have a preference, that is, he must share ratably, if at all; and the aggrieved creditor suing would be entitled to half of the value, as a debt for which he might sue, though his claim against the debtor might be less than the half sued for; and again, the remaining half would go to the Crown, though the legislature in making preferences unlawful did not provide that any penalty recoverable by the Crown should be prescribed for the offence.

As to the second point, we take exception to the proposition that the right of an aggrieved creditor under this Act is to have removed any impediment to his execution that may exist. This depends to some extent upon the reasoning already applied. Preferences not being unlawful under the Statute of Elizabeth, it could never have been intended that any remedy which was applicable to offences against that statute should be applied to acts which were not offences against it. In repeating the provisions of the Statute of Elizabeth, the Provincial Legislature may well be thought to have intended that the judicial remedy for offences against it should be introduced by implication. And we cannot therefore well except to the application of the doctrine in question to cases arising under that part of the statute which is substantially the same as the Statute

of Elizabeth. But when the Legislature prohibited something which was not an offence against the Statute of Elizabeth, it cannot by any possibility have intended to apply the remedy of the latter statute to the new offence. If, then, the Provincial Statute des not make th remedy expressly applicable, nor applicable by implication, is it such an appropriate one to carry out the intention of the statute against preferences that it should be annexed to the statute by judicial decision? We think not.

In *Stuart* v. *Tremain* it was said, "The plaintiff having no lien upon the goods and no execution affecting them while in the hands of Amey [the preferred creditor], why should not Amey have the same power of disposition as to those goods as the original debtor? Can he not validly sell and hold the proceeds to his own use? Why should his receipt of the proceeds invest him with the new character of being debtor to this plaintiff?" Because he has offended against the statute, and because he has obtained a preference by taking the goods in satisfaction of his debt to the detriment of other creditors when the statute declared positively that he should not do so, and by consequence, that his only right should be to share ratably with the other creditors. But the Court arrived at a different result and declared that there was no relief. This result is wrong because it violates a very plain principle of justice, enabling the offender to validate his own wrongful act. Unquestionably the preferred creditor has, by securing the preference, committed a wrong, an offence against the statute. The aggrieved creditors have an unquestionable right of action of some sort immediately upon committal of the offence to vindicate their rights. It is against all principle to permit the offender by his own mere motion to take away the other creditors' right of action without their having in any way committed themselves in such a way as to forfeit or endanger their own rights.

The reasoning in *Stuart* v. *Tremain* is just and logical as far as it goes. The assignment to a preferred creditor may be good between the parties, *i.e.*, it passes a title, and,

more than that, the debtor could not recover the property assigned. And as far as that is concerned there is no reason why the preferred creditor should not make a title to a *bona fide* purchaser. He may validly sell, it is true, but why should he hold the proceeds to his own use, his offence against the statute not being expiated? The wrong lies not in the acquisition or transmission of a title, but in acquiring it under such circumstances that with intent to do so he has defrauded or obtained a preference over other creditors. For this offence against the statute an action on the statute, to compel performance of its provisions, should lie.

The judicial remedy under the Statute of Elizabeth is not a suitable or appropriate remedy; because, if applied to the case of a preference it goes to declare that the goods in the hands of a preferred creditor are subject to the execution of the aggrieved creditor issued against the debtor, and should be sold thereunder to satisfy the judgment. This would be in effect, as shown in *Stuart* v. *Tremain*, to take away the preference from the preferred creditor and give it to the creditor suing. There is no warrant, as pointed out in that case, for so doing; no equity exists to compel the Court to prefer the aggrieved creditor over the offending creditor. What, then, do we deduce from this? The result was equivalent to a refusal to apply the remedy of the Statute of Elizabeth to the Provincial Statute. In this the judgment is inconsistent. For, while it declares that the preferred creditor is not accountable to the aggrieved creditors after he has parted with the goods and converted them into money, because the only remedy is to remove the impediment to execution while they are in his hands, it at the same time declares that the remedy by removal of the execution is not an appropriate one, because that would be to take away the preference from the offending creditor and give it to another. Upon this ground alone, we think, with deference, that the judgment should not be accepted as authoritative. If neither the remedy by accounting nor the remedy by removal of the impediment to execution is applicable, there is no remedy, and the statute is a dead letter.

Again, the reason for not applying the judicial remedy under the Statute of Elizabeth to the Provincial Statute shows that, whatever may be the appropriate remedy, that at any rate is not the one. It is clear beyond demonstration that if the complaining creditor seeks merely to have the goods declared subject to his execution in the hands of the preferred creditor he will get a preference (*d*). To permit this would be to offend against the statute, and not to carry out its evident intention that all creditors of an insolvent debtor shall share ratably. The preferred creditor has equal rights as to sharing with the aggrieved creditors; and while he may have committed an offence against the statute which should subject him to payment of the costs of an action to retrieve the wrong, there is no equity to deprive him of his share in the proceeds of the property. In all respects, then, this remedy is inappropriate and does not carry out the intention of the Act.

What then is the remedy? It depends upon the creditors' rights. It is said in the cases cited that the plaintiffs' (that is the aggrieved creditors) right is to have the impediment to execution removed. This we have shown is an artificial remedy applied to cases under the Statute of Elizabeth, but is no where declared to be the aggrieved creditors' *right*. The right of every creditor of an insolvent under this Act is to prevent every other creditor from getting a preference over him; in other words, the right of all the creditors is to share ratably in the assets. If this is the right, how easy it is to provide a remedy! No specific mode of operation is prescribed by the statute; no penalty is annexed to it; the artifical remedy under the Statute of Elizabeth is inappropriate. Is it not then the bounden duty of the Courts to compel observance of the provisions of the Act by a positive decree framed so as to carry out its provisions. It is too late to argue that forms of action are wanting and machinery does not exist for this purpose. Judgments are elastic; and no more simple decree or judg-

(*d*) We suppose now the case where there are two contract creditors and one gets a preference, leaving the other to sue.

ment could be framed than to declare that the aggrieved creditors of the debtor are entitled to share ratably and proportionately according to their respective claims along with the preferred creditor in the property or its proceeds or value obtained by the preferred creditor, and that the preferred creditor should pay the proportion into Court for distribution, or directly to the various creditors.

The argument may be used that it was not the intention of the Legislature to give such a right of action because in a succeeding Act (*e*) it declared that an assignee should have the exclusive right of suing for the rescission of transactions in fraud of creditors, or which offend against the Act respecting the fraudulent preference of creditors; and because by the same Act a right was given to sue for the proceeds realized from the sale of goods fraudulently transferred as fully and effectually as if the goods still remained in the hands of the fraudulent transferree. But a careful examination of these enactments will show that our argument is not displaced by them.

Section 7 (1) of the Act of 1885 gives the assignee an *exclusive right* of suing. Exclusive of whom? And for what purpose? Plainly, exclusive of those who have been defrauded or aggrieved, for none else could sue. And why exclude them, if they had before this Act no right to sue? This enactment, if it interprets previous legislation, can only be construed as excluding the aggrieved creditors from rights which they previously had and centring all rights in the assignee. If the statute had intended to give a new right, it would have been sufficient to grant it to the assignee in terms. If the aggrieved creditors never had it they need not have been excluded in giving the right to the assignee. If, however, the assignee will not sue, then any creditor may sue and take the benefit himself. But, it may be said, this pertains only to such actions as may at present be maintained, and would not have entitled the assignee to maintain an action to recover the proceeds of property disposed of by a preferred creditor, if

(*e*) 48 Vict. cap. 26, secs. 7, 8.

it had not been for section 8 of the Act of 1885, which expressly gives this power. And because this section expressly gives this power, therefore the right of action did not exist before.

The objection, though of some weight, is not sound, nor is it conclusive against the existence of the right of action before the section was passed. For instance, we have seen that part of the original Act has been held to be substantially the same as the Statute of Elizabeth. Upon similar reasoning it might be said that therefore the Legislature did not deem that the Statute of Elizabeth was in force, and found it necessary to pass the Provincial Act. Now no one will venture to assert that, because the Provincial Act declares void conveyances made in fraud of creditors, therefore the right of action to set aside such a conveyance did not before then exist. The contrary is well established. How then can it be said that, because section 8 of the Act of 1885 gave a right of action to sue for money, the proceeds of the disposition of property by a preferred creditor, the right of action did not exist before. The section may be simply declaratory of existing rights, or it may contain something new for which it was necessary to provide. It does contain something new. It gives to an assignee the right to bring such an action. We are familiar with the point that was raised under the old insolvent act as to the right of an assignee to reprobate acts done by the debtor. The assignee by voluntary assignment, it was argued, represents the debtor and cannot reprobate what the debtor has approbated. Hence he cannot bring an action to set aside a preference. Here, then, is an old right of action given to a new person, not the creation of a new right of action. The whole construction is consistent with our argument as to the right to compel a preferred creditor to account, and being consistent with the argument it does not disprove the proposition.

Let us sum up our conclusions as follows :

1. The Provincial Statute was intended to prevent any creditor from gaining the preference over any other credi-

tor. Hence each creditor has the right to prevent a preference, and, by consequence, all have the right to share ratably.

2. The special remedy by action for the penalty under the Statute of Elizabeth is not applicable, (a) because preferences are not unlawful under that Act, and the penalty was therefore not intended for such an offence, (b) the Provincial Legislature has not given that cause of action to a creditor who has been aggrieved by preference, (c) it is not an appropriate remedy because (i) the preferred creditor is divested of the whole value of the property, whereas he has a right to share ratably with other creditors, (ii) the creditor suing is entitled to half the value as a debt, whereas the half may exceed the whole of his claim, and the policy of the statute was to provide equal or ratable distribution.

3. The judicial remedy under the Statute of Elizabeth is not expressly made applicable to preferences.

4. The judicial remedy under the Statute of Elizabeth is not an appropriate remedy, because, (a) if a preferred creditor disposes of the property assigned, and is allowed to keep the proceeds, he gains the preference in the most satisfactory manner, (b) if he holds the property and execution is allowed against it, it takes away the whole from him, or sufficient to pay the suing creditor, whereas the policy of the Act is to make them share ratably.

5. An action should lie on the statute to compel specific performance of its provisions by equitable and ratable distribution, if an offence has been committed against it.

6. The succeeding and amending acts do not create an entirely new cause of action, and so show that there was no such right of action before; and their construction is quite consistent with the previously existing cause of action, if indeed they do not by implication show that it did previously exist.

EDITORIAL REVIEW.

The Rules of Practice.

The consolidated Rules of practice will come into force on the first of September, with a very important exception. It will surprise the profession very much to learn that the following rule has recently been passed :—

"It is hereby ordered that the Consolidated Rules, 210, 211 and 212 shall not come into force on the first day of September next, nor until the further order of this court be passed fixing a day for the same to come into force.

And it is further ordered that until such rules do come into force all matters of practice and procedure affected thereby shall be deemed to be in force as if the same were in substance repeated in this order."

The rule has not been published or brought to the notice of the profession in time to guide them in giving such notices of motions and appeals as are necessary to be given before vacation.

This, however, is a small inconvenience, as compared with the inconvenience which the rule perpetuates. The manner in which the weekly Courts and sittings in Chambers have been held since the passing of the Judicature Act has been a standing grievance to the public and the profession, and one which is well known to the Bench. When the revision of the Rules was in progress the Bar took a most active and useful part in the work and brought in many reforms; but whatever may be the value of other reforms there was none upon which so great a stress was laid as upon the entire fusion of the Courts. It is in the spirit of the Judicature Act, in the public interest, and in the interest of the profession that the new rules should be immediately put into force. When the Judges were given the power to make rules, even to the alteration of statutory

practice, it was never intended that they should, when exercising this power, run counter to the will of the Legislature. It has been the will of the Legislature ever since the Judicature Act was passed that all the Courts and all the Judges should have equal jurisdiction. By rules made in pursuance of powers granted to them by this Act the Judges have declined to allow this result to be attained. Nor was it intended that rules which were not in the public interest should be passed. And it is clearly against the public interest to waste judicial strength and to cause delays and inconveniences in litigation.

That it is against the unanimous desire of the profession is a matter of no small consequence, although one whose importance we may be prone to magnify. Suffice it to say upon this point that when the Bar were allowed to have a voice in the revision of the Rules, and when they proposed and urged, and when the Judges finally accepted, the fusion of the weekly Court sittings, they believed that a compact existed between Bench and Bar which ensured the adoption of this reform immediately. And they will regret to learn that the Bench have not considered that any compact or understanding existed.

It may be said that these new rules will not work while the sittings for trials and Divisional Courts remain as they are at present. The answer to that is twofold. A rearrangement of the sittings has been repeatedly urged but not adopted. And even with the sittings as they are at present there is no objection to the immediate adoption of the fusion of the weekly Courts. If two Judges can sit on the same day, surely one can do so; or if two must still sit there is nothing to prevent either from taking any business that may be brought before him. It is not the fact that one or two Judges sit or do not sit that forms the grievance. It is that when a Judge is sitting who has ample jurisdiction, he will not exercise it in all cases. And it is that there exist entirely distinct practices in bringing identical motions before the Courts when there is no warrant for them whatever.

BOOK REVIEWS.

A compendium of the Law relating to executors and administrators, with an appendix of Statutes, annotated by means of references to the Act, second edition. By W. GREGORY WALKER, B. A., author of the first edition of this work, and of "The Partition Acts, 1868 and 1876," and EDGAR J. ELGOOD, B. C. L., M. A., both of Lincoln's Inn, Barristers-at-law, and late scholars of Exeter College, Oxford; joint authors of "The law relating to the administration of the estates of deceased persons." London: Stevens & Haynes. 1888.

Walker & Elgood on administration has been found to be an excellent handbook, and adds to the reputation of the authors of this book. We may safely accord to them some praise for this larger work. While not so discursive as Williams, and therefore not so generally resorted to, it carries out all that as a compendium it professes to do, and gives in compact form the result of numerous decisions. It also contains in the appendix many Statutes which are most useful for reference, and which cannot always be had without going to the library at Osgoode Hall or some other centre.

A Compendium of the Law of Property in Land. By WILLIAM DOUGLAS EDWARDS, LL.B., of Lincoln's Inn, Barrister-at-law, formerly London University Law Scholar, and holder of the Inns of Court scholarship. London: Stevens & Haynes. 1888.

The plan of this book is something new in the treatment of what is commonly called real property law, but what the author prefers to call the law of property in land, because, as he says, a considerable portion of the modern

law of land consists of rules that fall under the head of personal property. It is foreseen by Mr. Edwards that a more modern method of treating the law respecting land will have to be adopted, and his book is a step towards it. The work is divided into four parts. Part I. deals with Rights of Ownership, under which are grouped Tenure, Estates in possession, in expectancy, in community, and equitable estates. Part II. deals with Rights of Property inferior to ownership, under which are grouped Powers, Rights of creditors, such as mortgages, lien-holders, etc., Rents, Easements. Part III. treats of Transfer of Rights of Property in Land, and Part IV. of Legal Capacity with reference to Rights of Property in Land. A rapid glance through the book shows that it will become most useful for reference, as a large number of authorities are referred to, the text being almost compressed into a digest, and the scope of the subject being very wide and comprehensive.

The Elements of Jurisprudence. By THOMAS ERSKINE HOLLAND, D.C.L., Hon. LL.D. Glasgow, of Lincoln's Inn, Barrister-at-Law, Chichele Professor of International Law and diplomacy, and Fellow of All Souls College, Oxford. Fourth edition. Oxford: At the Clarendon Press. 1888.

This well-known book maintains its popularity and usefulness as is shown by its reaching its fourth edition. The study of jurisprudence is becoming more widespread, and is producing a distinct effect upon modern law, and the fresh and comprehensive ideas which are derived from a comparison of systems of law, ancient and modern, will always be both useful and welcome. What jurisprudence really is, is shown by an exclusive process which leads the learned author to define it as "the formal science of positive law." The misapplication of the term to particular branches or systems of law is pointed out, and upon the basis of the science as defined the work is built. We strongly recommend this work to those who have leisure not only to read, but to ponder upon its subject matter.

Synopsis of the Provisions of the Companies Act (Revised Statutes of Canada, chapter 119, and 50-51 Victoria, chapter 20) relating to the incorporation of joint stock companies and the issue of letters patent, also of the Act, R. S. C. chapter 130, respecting the incorporation of boards of trade, with the necessary forms, to which is added a synopsis of the powers granted by letters patent to incorporated companies from 1869-1887. Compiled by W. E. HODGINS, M.A., Barrister-at-law, of the Department of Justice, Ottawa. Toronto : Carswell & Co. 1888.

This book is a compilation and in part an interpretation of the Companies Act, in so far as the procedure for obtaining letters patent is concerned. The practice of the Department is unknown to the public and profession generally, and this compilation, prepared by the gentleman whose duty it is to peruse papers presented in such cases, will furnish a safe guide to those who are called on to make such applications. It contains also the Companies Act, and, in an appendix, extracts from various letters patent heretofore granted to companies, which serve as precedents in drawing petitions for stating the objects of companies. There is also an index for each portion of the book.

A Manual of the Constitutional History of Canada from the earliest period to the year 1888, including the British North America Act, 1867, and a digest of judicial decisions on questions of legislative jurisdiction. By JOHN GEORGE BOURINOT, LL.D., F.R.S. Can., Clerk of the House of Commons of Canada, author of Parliamentary Practice and Procedure in Canada, Local Governments in Canada, etc. Montreal : Dawson Brothers. 1888.

Mr. Bourinot has condensed into one hundred and seventy-six pages those parts of his larger work which pertain especially to the subject matter of this title. We have read this little book with much pleasure. It places before

the reader in succinct form and in excellent literary style the outline of the constitutional changes which form the constitutional history of Canada. The chapters on judicial decisions and rules of construction are not what one might expect to find in a law treatise; but though fault might easily be found with them from the lawyer's point of view, we cannot complain of them from the point of view of the students and general readers for whom they have been written. We hope in the future to see the work enlarged. The material is in the smaller book, but it is capable of elaboration, and from being a students' work it may easily grow to an authoritative treatise.

REVIEW OF EXCHANGES.

Law Journal.—25th June, 1887.

Agents and Conversion. In *Turner* v. *Hockey*, 56 L. J. Q. B. 301, Phillips, who had given a bill of sale to the plaintiff on two cows, took one of them to an auctioneer who on receiving a bid therefor consulted Phillips, who told him to accept it. The auctioneer took his commission and gave Phillips an order for the money which he cashed. In an action against the auctioneer for conversion it was held that he was not liable, acting as he did as agent for Phillips only.

Estoppel and Interpleader. In *Richards* v. *Jenkins*, 56 L. J. Q. B. 293, it appeared that the claimant had upon a brickfield leased by him to the debtor certain plant which was seized and was the subject of this issue. The claimant became bankrupt after the lease but before the seizure, but the plant had never been taken possession of by his trustee. It was held by the Court of Appeal that the execution creditor was entitled to the goods. "The Master of the Rolls," it is said, "points out with much force that the moment of time at which the title is to be ascertained is the moment before the seizure, and that the possession after that is a possession for the law and not for either of the parties. * * The M. R. proceeds to show that in this case the possession at the time of the seizure was in the execution debtor, and that the onus lay on the claimant to show that this possession was in fact his. He could not do so by reason of the bankruptcy, and the question then arose whether the execution creditor was not estopped from making use of the bankruptcy. On this point the M. R. assumes that as between the claimant and the execution debtor there was an estoppel, but points out that the estoppel created no interest in the goods, but simply prevented the execution debtor from saying the goods did not belong to the claimant and did not bind the judgment creditor."

Ibid.—9th July, 1887.

Personal Defamation and Slander of Title and Goods. In a case of *Hatchard* v. *Niege*, 56 L. J. Q. B. 397, it was held that an action for a defamatory publication respecting wine sold by the plaintiff did not die with the plaintiff, but that if the executrix could show that the sale of the particular brand in question had been injured by the publication, she could recover.

Ibid.—25th July, 1887.

Married Women's Capacity to Contract. The decision in *Palliser* v. *Gurney*, L. R. 19 Q. B. D. 519, in which it was held that a married woman must have separate property to enable her to contract, is criticised. See *Law Journal* of 1st October, 1887.

Ibid.—13th August, 1887.

Commissions and the Agent's Authority. A case of *Toulmin* v. *Millar*, 55 L. J. Q. B. 445, is discussed, partly on the question of the right of the Court of Appeal to set aside a verdict and enter judgment against it as being absolutely wrong, and partly on the merits of the case which was an action for a commission. "The action was brought for commission alleged to be earned on the sale of property to a person introduced by the agent as the lessee of it, and the assumption upon which the Courts below went was, as Lord Watson stated it, 'that A. is entitled to a commission if he can prove that he introduced to B. the person who afterwards purchased B.'s estate, and that his introduction was the cause of the sale.' With this proposition the House of Lords finds it impossible to agree, and they lay down that in the case in question the issue for the jury was whether there was a general authority in the plaintiff to sell, or whether his general authority was only to let, unless he could sell for a certain minimum price, and that on his letting the authority to sell was revoked." "The decision of the House of Lords," says the learned writer, "will eliminate from the law Courts the loose phrase 'earning commission,' which has been found convenient, but which turns out to be misleading. A commission is not a bonus which the law awards to a person who has brought about a bargain between two others. There must be an employment as agent for reward, and an acting strictly within that employment."

Ibid.—20th August, 1887.

Domicil and Marriage Contracts. In *Re Cooke's trusts*, 56 L. J. Ch. 637, Miss Nicholson being a minor of English parentage married a Frenchman at Boulogne, having before the marriage entered into a contract for separation of goods. There were children of the marriage. Some years afterwards the wife left her husband and went to live with her father in Jersey, and did not return to France. After another period she married a Mr. Briggs, hearing that her husband was dead, and went with him to live in New South Wales until she died. Mr. Briggs claimed as residuary legatee, while the children of the first marriage claimed on the ground that under the French law they could not be disinherited. Stirling, J., held that the law of England, whether in virtue of a domicil by election in New South Wales or by reversion in England (the wife having abandoned her French domicil) applied, and that the prenuptial contract, assuming it to have the effect of controlling her power of disposition according to French law, was invalid, having been made when she was a minor. With respect to this decision the learned writer says: "The important question whether the law of domicil governs in

regard to incapacity will, perhaps, hardly be settled until the House of Lords has pronounced upon it; but it would be the natural and reasonable law. Questions of incapacity depend, so far as years of discretion are concerned, upon views taken of maturity, which largely depend on climate, and so far as coverture is concerned on the habits of domestic life, while so far as mental decay or natural weakness is concerned there is not likely to be much divergence between the laws of different countries. It is reasonable enough that as a man goes from country to country he should conform in each to the laws of contract of each, but it seems somewhat absurd that as he crosses a border he should come of age, only to sink into minority as he crosses another."

Committal and Attachment. The words of the Judicature rule, permitting the enforcement of a judgment by "any of the modes by which a judgment or decree of any of the Courts whose jurisdiction is transferred might have been enforced," have brought up the question as to the difference between committal and attachment in a case of *Callow* v. *Young*, 56 L. J. Ch. 690. There is a distinction in the mode of execution, namely, that an attachment is executed by the sheriff, while a committal is carried into effect by the officer of the Court. But a more fundamental distinction, Chitty, J., says, is that "committal was the proper remedy for doing a prohibited act, and attachment was the proper remedy for neglecting to do some act ordered to be done."

Ibid.—27th August, 1887.

Buying Property for sale to a Company. When property is bought for the purpose of selling to a company, in order to make the vendor accountable for the difference between what he pays for it and what he sells it to the company for, it must be shown not merely that the vendor had the company in his mind's eye, but that he made some public profession of acting in its behalf. He may thus place himself in a fiduciary position, though it is not the only way in which he may make himself responsible. *The Ladywell Mining Co.* v. *Huggons*, 56 L. J. Ch. 684, in which the point arose, is discussed.

The authority of a Company's Secretary. The fraudulent representation of a company's secretary made respecting debenture stock was held in *British Mutual Banking Co.* v. *Charnwood R. Co.*, 56 L. J. Q. B. 449, not to bind the company. It was a thing done with private ends in view, the secretary being in league with a person who had been issuing forged debenture stock. In *Barnett* v. *S. L. Tram. Co.*, 56 L. J. Q. B. 452, a letter of a secretary acknowledging receipt of notice that money retained in the company's hands was charged, and giving some colour to the belief that more was retained than the company actually had, being an innocent misrepresentation, was held not to bind the company.

Ibid.—10th September, 1887.

The application of the Married Women's Property Act. In *Clements* v. *Ward*, 36 L. J. Ch. 726, it was held that a married woman could not under the late Act by will dispose of a legacy for a church without her husband's assent, because, though the Married Women's Property Act gives a general power of disposition, the Statute of Mortmain as amended by an enabling Act, 43 Geo. III. c. 108, contains a proviso that it shall not extend to "women covert without their husbands." The learned writer inclines to think that the particular proviso is repealed by the general enabling Act. It was also decided that, though a married women can sue alone, she cannot act as next friend or guardian *ad litem* of an infant: *Thynne* v. *St. Maur*, 56 L. J. Ch. 733.

Ibid.—17th September, 1887.

Reasonable Alternatives in Railway Contracts. A shipment of cattle was made at owner's risk at a lower than the ordinary rate. There was an alternative rate, ten per cent higher, which the consignor had notice of, but whose contents as to liability for cattle carried he was not proved to have known. The alternative contract was ambiguous or puzzling in its terms. The House of Lords thought that if the consignor knew that there was an alternative at a higher rate, a contract which would otherwise have been unreasonable (namely, that which had been entered into at the owner's risk) might become reasonable. On the other hand if the consignor had seen the alternative contract, its terms were so vague and uncertain, that it might have been seen to be an unreasonable alternative. The railway company therefore got the benefit of the consignor's ignorance. The company, however, were still bound to show the reasonableness of the alternative contract.

The Privilege of Communications to Suitors and their Advisers. In *Young* v. *Halloway*, 56 L. J. P. D. & A. 81, it was held that anonymous letters written to a suitor containing information must be produced, but similar letters written to the suitor's solicitor are privileged.

Ibid.—1st October, 1887.

Palliser v. Gurney. This case which is now the leading case on the construction of the Married Women's Property Act is adversely criticised. See *Law Journal* of 25th July, 1887.

Presumptions and the date of death. In *Rhodes* v. *Rhodes*, 56 L. J. Ch. 825, it appeared that in 1850, Alfred Rhodes went to South Australia and was last heard of in 1873. Administration to his personal estate was granted some time after 1880, and it appeared that the persons who would be his next of kin if he died in 1873 were a different set of persons from his next of kin if he died in 1880. No provision is made in our law for fixing the presumed date of death. The presump-

tion of death arises from the reasoning or belief that if the absentee had been alive during the seven years he would have been heard of. Not having been heard of he is presumed to have died at some period in the seven years, but at what period the law saith not.

Ibid.—15th October, 1887.

Voluntary Forbearance as a Consideration. In *Crears* v. *Burnyeat*, 56 L. J. Q. B. 518, it appeared that a creditor, not being paid when his debt matured, took a blank note drawn for more than one person to sign to the debtor and procured it to be signed by him and his son. In an action on the note the jury were told that if the son signed the note in order that the plaintiff should give time to the father, they should find for the plaintiff. The learned writer thinks that they should have been told that they must be satisfied that the son requested the plaintiff expressly or by implication to give time to the father. Might it not have been put thus:—If the son signed the note because the plaintiff promised to give time to the father, the request for time might be implied? The point emphasized is that the forbearance need not have been obligatory, if in fact it took place.

Ibid.—29th October, 1887.

Perjury and Bankruptcy Examinations. A witness in bankruptcy having been duly sworn by the registrar retired to a room where the advocates examined him, the evidence being taken down by a shorthand writer, and the registrar returning to Court, though ready to intervene in case of necessity. On perjury being laid it was held by the Court of Crown Cases Reserved that it would not lie. The Act declares that "the Court may examine orally or by written interrogatories any person." But though the registrar may represent the Court a shorthand writer does not.

Ibid.—26th November, 1887.

Two Cases in the Lords and the Judicial Committee. In an appeal from Malta, where there is no statutory regulation of trademarks the judicial committee held that an imitation of a well known trademark for cigarettes might be restrained, it being established that the imitation was likely to deceive purchasers. It was said not to be necessary that the imitators should have intended to deceive, though from the use of the mark it was hard to avoid the conclusion that they did. In an appeal from Scotland it was held that the rules of a building society were binding on the society and the members, and prevented a deduction of a certain assessment from the shareholders' accounts.

Ibid.—10th December, 1887.

Agreements in Restraint of Trade. Some further remarks on *Davies* v. *Davies*, reviewed ante p. 156, upon the case coming before the Court of Appeal. There is some discussion as to the applicability of the old rules to the present state of society.

Ibid.—31st December, 1887.

Volunteers and Employers' Liability. The application of the maxim *volenti non fit injuria* to cases under the Employers' Liability Act is discussed. The result of the decision, *Yarmouth* v. *France*, 57 L. J. Q. B. 7, is that knowledge of the danger is not sufficient to absolve the employer. In this case it appears that a man was assigned to drive a horse which was addicted to the vicious habit of kicking. The plaintiff complained, but continued in his employment, and was finally injured by a kick from the horse, for which he recovered damages.

Ibid—7th January, 1888.

The Lords on the Rights of Lecturers. The case of *Caird* v. *Sime*, 57 L. J. P. C. 2, is discussed in which it was held that a lecturer has a right of property in the creation of his brain and does not part with it by delivering a lecture to students.

Ibid.—14th January, 1888.

Infants' Necessaries. In *Johnstone* v. *Marks*, 57 L. J. Q. B. 6, it was pointed out that the privilege is the privilege of the infant, not of the tradesman, and that it is not sufficient to show that the articles sold come within the class known as necessaries; it must be shown that they were necessary for the infant who has procured them.

THE

CANADIAN LAW TIMES.

AUGUST, 1888.

WILLS OF MARRIED WOMEN.

BETWEEN the 1st January, 1874, and 1st January, 1888, amid all the other difficulties which surrounded any dealing with the property of married women, it was at least considered settled that the words "person" and "testator" in the Wills Act included a married woman (*a*) and that such a woman's power of disposition by will was unlimited. By the Wills Act it was and still is enacted, that "every person may devise, etc., all real estate, etc., which he shall be entitled to either at law or in equity at the time of his death, and which if not so devised, etc., would devolve upon his heir-at-law or upon his executor or administrator." These words were wide and comprehensive enough to cover not only what is technically known as equitable separate estate over which a married woman always had a power of disposition by will, and statutory separate estate over which before 1st January, 1874, her power of testamentary disposition was limited to her children, or failing any, as she might see fit, but also covered all other property which "if not so devised, etc., would devolve upon her heir-at-law or upon her executor or administrator;" and under this designation would come property which she became entitled to at or after

(*a*) 36 Vict. cap. 20, sec. 4; R. S. O. (1877) cap. 106, sec. 9, s-s. 4; *Armour* on Titles, 233; see Interpretation Act, "Person," R. S. O. (1887) cap. 1, sec. 8, s-s. 13.

becoming discovert. Wills made by married women are of frequent occurrence and not infrequently no new will is made after the guiding hand of the husband has been taken away, although by his death the property may have been considerably augmented from his estate.

In the last revision of the statutes, sub-section 4 of section 9 of the Wills Act as it theretofore existed is omitted, and there is no clause or section interpreting "person" and "testator" to include a married woman (*b*). The omission must have occurred either by design or by accident. If by design then the effect was surely not foreseen; but in any event the revision is slovenly done, for in section 1 of chapter 110, the interpretation of "person" and "testator" as given in the Wills Act is adopted. If by accident, then the result, if I am correct in my conclusions, is the best evidence of the slovenly character of the work (*c*). The old Wills Act stands repealed from 31st December, 1887 (*d*). The English legislation on wills of married women was until the revision not so progressive as ours. We were in advance. Now by the fiat of the reviser the will of a married woman is rendered less effective and the legislation is made retrogressive.

By the Imperial Statute relating to Wills (*e*) it was enacted that "no will made by a married woman shall be valid except such a will as might have been made by a married woman before the passing of this Act."

Married women were expressly excepted from the first Statute of Wills (*f*). Her will of land was therefore invalid, and her will of personalty was equally invalid, not merely because marriage was a gift of her personalty to her husband, but because in the eye of the law the wife had no existence apart from her husband and no separate disposing or contracting power. On this general rule some

(*b*) See R. S. O. (1887) cap. 109, sec. 9.
(*c*) For a further example, compare cap. 100, sec. 5, and cap. 122, sec. 8.
(*d*) 50 Vict. cap 2, sec. 5.
(*e*) 1 Vict. cap. 26, sec. 8.
(*f*) 34 & 35 Hen. VIII. cap. 5, sec. 14.

modifications were engrafted. (1) A married woman who was an executrix had, as such, power to make a will and appoint an executor for the purpose of continuing the representation to the original testator. (2) A married woman might make a will with the consent of her husband. (3) A married woman might make a will in the exercise of a power. And (4) a married woman might make a will disposing of her separate estate or savings (*g*).

A will of a married woman was not valid as made with her husband's assent unless it was proved that he knew the contents of the will. The effect of the husband's assent was merely to withdraw his claim to administration in case he survived the wife, and therefore if he predeceased her, the will derived no support from his assent. It followed then that a will made by a married woman during coverture, did not in the event of her surviving her husband pass any property acquired by reason of or after the husband's decease, unless the will was re-executed as an original will is required to be under the statute (*h*). Thus stood English law until January 1st, 1883. On that day the Married Women's Property Act, 1882, came into force. Sub-section 1 of section 1 of that Act, is in the same words as sub-section 1 of section 8, of the Married Women's Property Act (*i*), and enacts that "A married woman shall in accordance with the provision of this Act be capable of acquiring, holding and disposing by will or otherwise of any real or personal property as her separate property in the same manner as if she were a *feme sole* without the intervention of any trustee." In *Re Price, Stafford* v. *Noble* (*j*), Mr. Justice Pearson held that this section enabled a married woman to dispose during coverture of her separate property only and not that which she might acquire after the coverture had ceased. There is now in force in Ontario no other enactment relating to wills of

(*g*) Per Lord Cairns, L. R. 7 H. L. 589, 590.

(*h*) *Noble* v. *Willock*, L. R. 8 Chy. 778; *Willock* v. *Noble*, L. R. 7 H. L. 580.

(*i*) R. S. O. (1887) cap. 132.

(*j*) L. R. 28 Ch. D. 709.

married women than that contained in the English Act which was so construed. If that decision is correct, the moment a woman acquires property after becoming discovert she must therefore make a new will. No prior will can affect such property. A will made before marriage is revoked by the marriage. A will made during coverture affects only such property as is held during the coverture.

The result is—

1. Before 4th May, 1859, a married woman could not make a will except in the four cases before specified.

2. Between 4th May, 1859, and 1st January, 1874, a married woman had the additional right of disposing by will of her statutory separate property, real or personal, or of any rights therein, to or among her children, issue of any marriage, and failing there being any issue then to her husband, or as she might see fit (*k*).

3. Between 1st January, 1874, and 1st January, 1888, a married woman might dispose by will of all real and personal estate which she might be entitled to, either at law or in equity, at the time of her death, and which, if not so disposed of, would devolve upon her heir or administrator.

4. The right of a married woman to make a will is now given solely in *The Married Woman's Property Act*, section 3, and a will made during coverture will not pass property acquired on or after the death of her husband.

JAMES BICKNELL.

(*k*) C. S. U. C. cap. 73, sec. 16; R. S. O. (1887) cap. 109, sec. 6; *Mitchell* v. *Weir*, 19 Gr. 568.

ONTARIO LEGISLATION, 1888.

THE Statutes for this year form a comparatively thin volume, and on inspection do not disclose the usual number of new laws and amendments. There are, however, several important enactments to which we shall endeavour to devote due attention.

The first act of importance is the Act respecting the Revised Statutes, which confirms the Statutes as revised in the form which has heretofore been adopted. Section four of this Act will probably have the most important bearing in practice. By the second section of chapter 8 of 50 Vict., power was given to the Judges to make rules in respect of and varying statutory enactments affecting practice and procedure, or matters in the nature of practice and procedure, in the revision and classification of the Rules of Court. Pending the revision, amendments and alterations were suggested and carried out which were far beyond what was contemplated by the revision. In the meantime, however, the Statutes were consolidated, brought into force and published before the work on the Rules was completed, and as the Commission for revising the Statutes did not take cognizance of the changes in practice, the Statutes were issued on the assumption that the old practice remained in force. The consequence was that in some very important respects there was a direct conflict between the Statutes and the Rules of Practice. For instance, in *quo warranto* proceedings under the Municipal Act a distinct and unique practice is provided by the Act. It was thought desirable to abrogate this technical and cumbersome proceeding and substitute for it a simple procedure by notice of motion. Again, the writ of *capias ad respondendum* was abolished and an order of arrest substituted therefor, the action proceeding in the usual way as if no arrest had been ordered. So with absconding debtors, an ordinary action is commenced, and an order of attachment

is issued in place of the procedure by writ of summons and attachment. In these respects the Rules as consolidated differ from and conflict directly with the Statutes on these subjects which, in the consolidation, appear in their old form. Section four of the Act under review was introduced for the purpose of correcting the difference and giving effect to the Rules as consolidated. It enacts, after reciting that various enactments have been omitted from the Statutes in consequence of their being included in the Rules, that the Rules as consolidated "are hereby confirmed and declared to have the same force and effect as if the same were herein repeated and enacted (and all inconsistent enactments in the said Revised Statutes are hereby repealed), except in any respects in which the said Rules may have been voided by statutes passed during the present session of this Legislature, and which said Consolidated Rules, or such Rules as so varied shall, like other Rules of the said Judges, be subject to be annulled or altered by new Rules of Court made under the authority of the *Judicature Act*." This enactment leaves to the Court the very widest scope for giving full effect to the new rules, inasmuch as the extent of the repeal of inconsistent enactments, depends entirely upon the scope and effect of the rules. The exception in favour of statutes passed during the session is null, as no statutes affecting practice were passed, unless indeed it can be said that the Act respecting Muskoka and Parry Sound, chapter 18, has that effect to a limited degree. By section 15, sub-section 4, of this Act, it is declared that "no writ of *capias* issued under the next preceeding sub-section shall be executed outside of the District of Muskoka, etc." It might be said that this referred to writs of *capias ad satisfaciendum*, were it not that the preceding sub-section speaks of "writs for the commencement of actions," and evidently points to the commencement of actions by writs of *capias ad respondendum*. In order to avoid confusion it will be necessary to hold, that through inadvertence the Legislature used the term "writ of *capias*" instead of "order of arrest," otherwise the new judicial district created by that Act

would have a practice entirely distinct from the remainder of the Province.

Passing over some statutes of public importance, but not affecting general practice, we come to the Act respecting Ancillary Probates and Letters of Administration, which has already been referred to by Mr. Howell in this journal (*ante* p. 130). The letters issued by another British Province, or by a competent Court in the United Kingdom, are not to be sealed in this Province until a certificate has been filed under the hand of the registrar of the Court which issued the letters, "that security has been given in such Court in a sum of sufficient amount to cover as well the assets within the jurisdiction of such Court as the assets in Ontario;" what was meant, we presume is that it should be certified that security has been given to cover as well the assets in Ontario as in the jurisdiction of the Court granting the letters. If such certificate be not produced, the security must be given in Ontario for the Ontario assets. No provision is made in this Act for the form of the security, and nice questions are likely to arise as to this. The distribution is to be made according to the law of the domicil, though the assets (except land) may be found elsewhere. The object of an ancillary administration is, as we understand it, to get in the assets which, for the purpose of administration, have a *situs*, and pay the debts in the country in which they are found, remitting the balance, if any, to the administrator at the domicil. Cases may arise in which distributees may, on equitable grounds, actively assert the right to retain the balance for certain purposes, but this must be done, we apprehend, by action. In ordinary cases of administration, the law of the domicil governs the distribution, and the administrator at the domicil should see to it. The security to be given at the domicil, therefore, should, pursuant to this Act, take cognizance of the state of the law upon this question, and have a separate provision especially applicable to the assets recovered or to be recovered under the ancillary letters. If the security be given in Ontario it would necessarily be different in effect

from that to be given at the domicil, if the duty of distributing is not imposed upon the administrator by the ancillary letters.

In the case of land, to which under our law the personal representative now succeeds, a different rule will have to be adopted. Land will necessarily be dealt with according to the law of the country in which it is situated. This does not seem to have been kept in view in passing *The Devolution of Estates Act*, but the words of that Act do not militate against this doctrine, and must necessarily be confined and restrained by it. It may perhaps be deduced from the wording of the Act that this restriction is to be applied. The words respecting distribution are as follows: "And so far as the said property is not disposed of by deed, will, contract or other effectual disposition, the same shall be distributed as personal property not so disposed of *is hereafter to be distributed.*" A slight change is made in this Act as to the course of distribution of personal property, and as this is intended of course to be local, and to refer to persons dying within this jurisdiction, it follows necessarily that land is to be distributed according to local laws. Bearing this in mind, the security to be given in a foreign Court when land is to be administered will differ essentially from what it would be in the case of goods. And so in the case of security given in Ontario. Indeed, for the moment, it appears to be the law that the administrator of the *situs* of the land should in every case make the distribution. The Act under review removes the question of a possible conflict of interest between the administrator at the domicil and the administrator by ancillary letters, for the one person will represent the estate in both jurisdictions. His duties, however, will be defined and limited by the duties which would have been performed by two administrators. Whatever doubt may now exist as to whether land in Ontario vests in a foreign administrator or not, upon intestacy, there will be no doubt apparently after this Act comes into force, that upon the sealing of the foreign letters the land will vest in the personal representative so appointed, subject to distribution according to

local laws. The Act is not to come into force until proclaimed, and in the meantime we think that there is a great deal of food for reflection, and some necessity for dealing with the subject more in detail before it is brought into force.

Chapter 10 amends the *Division Courts Act*. Section 1 makes no change in the sense, though an alteration in the wording of section 100 is made. Section 2 extends the right of appeal to the parties to garnishee proceedings where the amount is over $100. Section 3 makes a change the purpose of which is not manifest. Under section 240 of the *Division Courts Act* the Judge may commit a judgment debtor under certain circumstances, one of which is, if the debtor "wilfully contracted the debt or liability without having had at the time a reasonable expectation of being able to pay or discharge the same." This clause is struck out by the Act under review, and it will now be the law that a man may wilfully incur liabilities without any reasonable expectation of dis-discharging them and yet cannot be punished by process under judgment summons. The preceding clause of the *Division Courts Act*, with very little stretching, would cover the ground formerly covered by the repealed clause. It provides for the case of a person who obtains credit from the plaintiff or incurs the debt or liability under false pretences, or by means of fraud or breach of trust. Every man who enters into a liability impliedly vouches himself as able to discharge it unless under special circumstances which may rebut the implication. In ninety-nine cases out of a hundred the purchase of goods upon credit is based upon the belief of the vendor that the purchaser will pay; and the self-presentation to the vendor of a man *as a purchaser* is a representation of ability and intention to pay. If at the time there is inability to pay there is a false pretence. Although this reasoning might commend itself to vendors it is too refined, perhaps, for general use. There must apparently be under this clause some untrue representation of fact. If all vendors were skilled in this knowledge it would be very easy to entrap a purchaser into making a false representation under this clause; but the

clause is of such a nature that it will easily cover a very slight pretence if it is in any degree false.

The *Creditors' Relief Act* is again amended so as to further obliterate priorities. By this Act those having writs against goods and lands share with each other in the proceeds of the sale of realty.

Mortgages, as usual, come in for their share of attention. As a rule, mortgagees have to make their own contracts, while almost every year the Legislature devotes its attention to making contracts for mortgagors. Chapter 15 is devoted to amending the law respecting mortgages. The second section is drawn to counteract the effect of a recent decision in which it was held, as it had before been understood, that the law which required a mortgagor to give six months' notice of paying overdue principal was in force in this Province. No doubt as the knowledge of the law of mortgages extends, legislators will in the future make other amendments in favour of the mortgagor. The effect of the section in question is that when default has been made in payment of principal secured by a mortgage, the same, that is the principal, may be paid *at any time* thereafter without previous notice to the person entitled to receive the same and without the payment of any interest in lieu of such notice. The default, however, does not include a default in payment of principal which matures by reason of default made in payment of interest or by reason of some other default made in the payment of an instalment of principal. But it does extend to an overdue instalment of principal. Mortgages made prior to 1st July, 1888, are not within the Act. A loophole for escape from the whole enactment is provided by allowing an express agreement to be made to make applicable the old law. It is presumed that the intention of the draughtsman was to compel mortgagees to introduce an express independent covenant or agreement detailing the circumstances under which interest should be paid or notice in lieu of interest given. No doubt this will be taken advantage of by all conveyancers who know of the existence of the Act.

Section three of the Act shortens the time for exercising the statutory power of sale, which no one ever uses, provided by R. S. O. cap. 102, sec. 18. The next clause, section 4, of the Act under review provides that the statutory power of sale may be used notwithstanding that there is a power of sale contained in the mortgage in accordance with the short forms of mortgage Act.

Section five was drawn to meet the cases which come within *Re Gilchrist & Island*, in which it was decided that the statutory short form of mortgage was not susceptible of change so as to provide for exercise of the power of sale without notice, and therefore that an assignee, not being expressly named in the short form, could not exercise the power. Instead of proceeding to remedy the law as interpreted by that decision, which by the way has been doubtfully received, the Legislature aims at making good all sales heretofore made, irregular on that account, unless proceedings have been taken within two years after the sale to set it aside. No provision is made for future cases. The draughtsman looked so closely to his point in drawing this clause that he did not take in his surroundings. The clause is too general. It does not specify the cause of invalidity or irregularity with sufficient clearness. It validates all sales made by assignees instead of original mortgagees. So that whenever an assignee has exercised a power that was exercisable only by the mortgagee the sale will be valid though the irregularity may have been something else than that which furnished the reason for the decision in *Re Gilchrist & Island*. An assignment of a mortgage which is void does not entitle the assignee to exercise any of the powers in the mortgage. Any sale made by an assignee under such circumstances will be invalid, the reason being that the assignee cannot exercise the powers while the mortgagee can. Such a sale would be validated by this clause if we are to adopt the general language which has been used. The only escape from this result is to incorporate the history of *Re Gilchrist & Island* into the section and judicially limit it to cases falling within the principle of that decision.

Chapter 17 is an Act to amend the Registry Act. By section one it is provided that a registrable instrument which is or purports to be a power of attorney or authority to sell land in which the commission or remuneration is made a charge on the land, shall not under certain circumstances have effect to charge the lands with the commission. The peculiarity of this clause is that though it speaks of instruments capable of being registered, it does not apply to registered instruments only. It applies generally to all instruments within section 2 of the Registry Act, *i. e.*, all registrable instruments They are not to charge the land for a longer term than one year from the making of the instrument (if the instrument is post-dated, this will be a difficult matter to determine), if made after the passing of the Act, or "after the lapse of one year from the passing of this Act where the instrument has been heretofore made or executed."

The draughtsman has been unnecessarily precise, dangerously so, in again introducing a clause as to the application of this section. In section 3 he says, "Section 1 of this Act shall apply at the end of one year after the passing of this Act as well to instruments registered before as after the passing of this Act." The intention is not quite clear. An instrument made before the Act is affected by it immediately under section 1, and the charge becomes ineffectual at the expiration of a year from the passing of the Act. The date or fact of registration makes no difference. If registered before the Act, the third section makes the Act apply at the end of one year after the passing of the Act. No difference that is easy to discern is made by this clause. If the instrument is registered after the Act, then, according to section 3, which says nothing about the date of the instrument, the Act applies at the end of a year from its passing. In this latter case a conflict may arise. If the instrument is made after the Act, then, by section one, the charge expires in a year from the making of the instrument; but if registered the charge expires at the expiration of a year from the Act under clause 3.

The second section of the Act would be very difficult to construe if its history on going through the House were not known. It bears evidence again of the draughtsman having looked so closely at the subject that he was attempting to deal with, that he could see none of the surroundings. It became known that sundry evil disposed, and many well-disposed persons, who sold agricultural implements to farmers, took from them agreements to charge the price on their land. It was alleged that in this way farmers were fraudulently procured to mortgage or charge their land, and that a remedy should be provided. Now there is no doubt that if a *bona fide* agreement to charge land with a debt is made, no one should complain. If a charge is fraudulently procured, the person defrauded has a right to complain. The evil lies not in the practice, which may be an essential one, of taking a mortgage for goods sold and unpaid for, but in the fraudulent practices that no doubt existed of enticing farmers and others to sign papers of whose contents they were kept in ignorance. This statement seems to show the impossibility of dealing properly with the evil in question. A remedy exists, perhaps the best known, namely, that persons defrauded can get redress in the Courts for any species of fraud, the law never having given the opportunity to deceitful persons to evade the process of the Courts by defining, and so limiting, fraud.

Nothing daunted, however, the Legislature attacks not only the evil in question, but in the general terms of the clause denies the right of registration to every registrable instrument "which in its nature is, or purports to be, given as a security for the payment of a debt or liability incurred by the person giving the same in respect of a purchase or delivery of any goods," unless the affidavit of execution states that the instrument was read over and explained to the person executing the same, and that he appeared perfectly to understand the same, and was informed that it might be registered as an incumbrance on his land. This is much more extensive in terms than was intended by the framers of the Act, because it covers not

only every instrument which purports to be given as security for goods sold (within which come the fraudulent charges aimed at), but also all instruments which are *in their nature* security for goods sold. If an instrument is in fact security for goods sold, that is its nature. If it is not, then it is not a security of that nature; and the introduction of the words "in its nature" would not therefore seem to have any effect. An instrument may therefore be of that nature, that it is to secure the price of goods sold, and though there may be nothing on its face to disclose this, it will be within the Act. It will therefore apparently be the duty of Registrars to ask, in every case in which an incumbrance is presented for registration, whether it is security for goods sold, and, if so, to refuse registration unless the affidavit provided by this Act is appended.

So far we have seen the intent of the terms of the Act. What is the general effect? The Act declares that such an instrument shall not be registered. But suppose the Registrar does register it. This is not a violent supposition. Many irregular instruments have been registered. The instrument itself remains valid or invalid as before the Act, according to the circumstances under which it was made. The registration is notice. The mere fact that the Registrar has taken an instrument which he should not have taken does not affect either the instrument itself or the effect of registration. Registration is *per se* notice, and no one dealing with the land can afford to disregard it. By section 80 of the *Registry Act* registration is made notice, "notwithstanding any defect in the proof for registration, but nevertheless it shall continue to be the duty of every Registrar not to register any instrument except on such proof as is required by this Act." Nothing could be stronger than this prohibition against registration, and yet the registration when it once takes place is good. If the Act had made the registration void, or declared it not to be notice, or had proceeded in some direct way to leave the land negotiable notwithstanding the registration, which was probably what the draughtsman aimed at, they would have partly remedied the evil. But the mere declaration

that such instruments shall not be registered does not prevent the obtaining of instruments which on their face do not appear to require the affidavit prescribed, does not prevent the fact of registration, if the Registrar chooses to receive them, does not prevent the consequences of registration if it takes place.

Section 5 provides that letters of administration may be registered. Since the *Devolution of Estates Act* the title to lands, of which the owner has died intestate, depends on the letters of administration, and no direct provision for registering them was made. But such instruments have been registered under the second section of the *Registry Act* as "an instrument whereby lands may be affected."

Chapter 19 deals with hire and sale receipts. It is designed to protect purchasers and mortgagees without notice from the consequences of taking goods which have been sold under agreements that the property shall not pass until the price is paid. The Act does not protect creditors other than mortgagees. The work of drafting is by no means skilfully done and in consequence it is rather difficult to ascertain the exact meaning. The first section declares that hire receipts and such like documents shall only be valid as against subsequent purchasers or mortgagees without notice in good faith for valuable consideration "in the case of manufactured goods or chattels, which at the time possession is given to the bailee, have the name and address of the manufacturer, bailor or vendor of same painted, printed, stamped or engraved thereon or otherwise plainly attached thereto, and no such bailment shall be valid as against such subsequent purchaser or mortgagee as aforesaid, unless it is evidenced in writing, signed by the bailee or his agent."

The first requisite is that the goods or chattels in question should be manufactured goods. This is evidently the result of using the expression "in the case of manufactured goods." It is not easy to see why a distinction should be drawn between manufactured and other goods. In the case of petroleum, which is a natural product refined for use, there may be a good deal of contention and

not a little doubt as to whether it is "manufactured goods" or not, and it was a sale of petroleum which first brought the question before our Supreme Court in *McDonald* v. *Forrestal* (*a*). Again, a doubt is raised, by the manner in which this section is drawn, whether it was intended to be confined in its operation to manufactured goods only, or whether it was intended to apply generally to all goods and chattels, manufactured goods being specially required to have the name of the manufacturer attached thereto. The section is certainly open to the construction that it applies to manufactured goods only; but as there is no particular reason for so limiting its operation there will be a natural tendency to extend its operation to all sales of goods and chattels, and to construe the Act as requiring the name of the manufacturer to be attached to manufactured goods only. This construction is however open to the objection that the information required by a proposed purchaser cannot be got unless the name of the vendor or bailor is placed upon every chattel which is conditionally sold, and therefore the name of the vendor should be on every chattel whether manufactured or not. In the case of a horse or other animal it may be found difficult to apply the section in this respect.

The second requisite is that the name and address of the bailor shall be attached to the chattel. All manufactured goods are as a rule emblazoned with the name of the manufacturer and his address. The exception is to find such goods without a name. Whether one buys a piano, a sewing-machine, a reaper or a bottle of ale, he will find the manufacturer's name thereon. So far as this part of the statute goes, then, it will make no practical change in the law. It is not required that any particular information shall be given beyond the name and address, nor that that information should be given in any particular way. An effect not intended by the Act may be its result. In every case in which a manufactured article bears the manufacturer's name, it may be that the name has been

(*a*) 1 C. L. T. 728.

put on in accordance with the usual custom, or it may be that it has been done in accordance with this statute. There may, and in most cases will, be nothing to show for what reason it has been put on the chattel. A purchaser from a middle-man would not be excused (seeing the name so emblazoned on the chattel) from making enquiries as to the right of the proposed vendor to sell, and in the case of large purchases it may well be the result that no careful buyer will complete a bargain for the purchase of goods bearing the manufacturer's name without first communicating with the manufacturer. It may be said that all buyers are even now liable to the risk of buying from people who do not own what they profess to sell. That is true. The defect in the Act, in this respect, is not in protecting the manufacturer who puts his name on his goods, but in merely requiring him to do no more than he already does. There is no distinguishing mark or line between the chattel which bears the name and address of the manufacturer as an advertisement or guarantee, and that which bears the same as a caution to purchasers that the property remains in the manufacturer.

Another manifest defect in the Act is that the refusal of the bailor to furnish information as to his lien when called upon to do so is merely made an offence punishable by fine. The validity of the lien is not affected. The silence of the bailor under such circumstances will necessarily be ambiguous in many cases. Take the case of a manufacturer in Quebec sending goods into Ontario. On application by a purchaser from the vendee of the manufacturer for information as to the goods, the latter is silent. It may be that he has no further interest in them, or it may be that, while retaining the property in them, he knows that his interest will not be affected by his silence, the only penalty being a fine to which he is not amenable as being beyond the jurisdiction. So with the succeeding sections of the Act as to seizure and sale. A foreign manufacturer may seize and take the goods out of the jurisdiction, where he may dispose of them as he pleases.

By section 6 the first section is not to apply to house-

hold furniture; but pianos, organs, or other musical instruments are not included in the term "household furniture." Sewing machines are not musical instruments. Are they "household furniture"?

By the same section the option is given to bailors of filing a copy of the receipt note with the Clerk of the County Court of the county in which the bailor resides, within ten days from the execution of the note. It would have been more convenient to make this period five days, so as to agree with the period for registration of a bill of sale or chattel mortgage. By section 8 the bailor is to leave a copy of the note with the bailee at the time of its execution, or within twenty days thereafter. This period should be the same as the period for registration, if it is necessary to give any time for delivering the note. It is not easy to see why any latitude should be allowed in this respect. The documentary evidence of the title to the property should be left with the bailee at the time of the delivery of the chattel.

The property of married women, respecting which the law is always in a state of fermentation, again receives attention. When passing the Act of 1884, the Legislature repealed that portion of the Act respecting the conveyance of married women's property which required the joinder of the husband, and also those portions which provided for an order being made by a Judge for the wife to convey without the husband joining in certain cases. The result of the repealing Act was as follows: In every case in which the husband had a controlling power over the conveyance of his wife's land, that power was removed. In cases in which the husband had an estate by the courtesy, though the controlling power over the wife's estate was removed, and so she could convey all her own estate without his assent, yet his estate by the courtesy remained, and therefore he was still a necessary party to convey his interest. When a husband who was entitled to courtesy was separated from his wife, or for some other reason his concurrence could not be got, there was, after the Act of 1884 and until the Act of last session was passed, no

means of getting a conveyance of the whole estate or the land from a woman whose husband was entitled to courtesy. This defect is now remedied by chapter 21 of the Acts of last session. It provides for two classes of cases, first, when the husband is entitled to tenancy by the courtesy, and second, when the woman is unable to give a valid deed without her husband joining. We believe that the first class includes all cases which will come within the Act, in other words, that there is, since the Act of 1884, no case in which a husband has a controlling interest in his wife's land unless he is entitled to courtesy therein (*b*). The Act then proceeds to detail the circumstances under which an application may be made to a Judge for an order to convey, and adds the general clause "or if there is in the opinion of the Judge any other cause for so doing," *i.e.* for making the order, thus giving the very widest discretion to the Judge to determine when the wife should convey the husband's estate. The Act is more explicit as to the effect of a conveyance under such an order than the old Act was. The latter did not expressly authorize the wife to convey the whole estate in the land, though that was commonly understood to be its effect. It must be borne in mind that when the old Act was in force a married woman could not convey even her own estate in the land (except separate estate) without her husband's assent. This assent was necessary to the conveyance of her interest, and he had also to convey his own estate by the courtesy. The probability therefore is that conveyances made in pursuance of orders made under the old Act passed only the wife's estate in the land and left the husband entitled as before to his own estate. Under present legislation, as we have seen, the wife may now in every case convey her own estate in the land without the husband's assent, and the necessity for the present Act exists only when the husband has an estate by the courtesy. The whole result of the Act is therefore to enable a wife to obtain an order to convey her husband's estate by the

(*b*) See *Re Gracey*, noted in the present number of Occasional Notes, p. 305.

courtesy. It has already been construed by Mr. Justice Street, who in a case of *Trust & Loan Co.* v. *Jones* tried at the Toronto Assizes on 14th May last, held that he had a discretion to determine the circumstances under which he might order a conveyance, that the Act allowed him to make a general order for permission to convey, and that it was not necessary that an actual sale should be either in progress or contemplation at the time of making the order.

EDITORIAL REVIEW.

The Bar and the Public.

During the last few months a good many matters affecting the civic affairs of Toronto have been before the courts, and in proportion to the interest which they have excited the court rooms have been more or less resorted to by the public and newspaper reporters. The presence of both in the court rooms is not a matter of comment; for seats are specially provided for the public and we may expect to find them occupied. What calls for remark is the fact that the seats provided for the public are not used by the reporters who prefer to invade the seats reserved for the bar to the discomfort and inconvenience of the latter.

On a recent day when Mr. Justice Robertson delivered judgment on the application to restrain Judge McDougall from proceeding with the Toronto Board of Works investigation, there were eleven newspaper reporters occupying the first and second rows of seats reserved for the bar, and several gentlemen of the bar who attended to hear judgment in other cases had to sit where they could, not where they would, in consequence. Heretofore the Bar has not insisted strictly upon its rights, nor on the other hand has it been dealt with strictly by the Courts. No objection has ever been made to strangers sitting amongst the members of the Bar, nor has the privilege ever been denied to Barristers or Solicitors not properly dressed of sitting in the accustomed seats, though it becomes a privilege only and not a right to sit there when the proper robes are not worn. However, the recent events which we have spoken of, have brought the matter prominently into view. The privilege of sitting within the seats of the Bar is being grossly abused. The accommodation for the Bar is not the best, but they decidedly

object to being driven from one place to another to look for seats when a dozen newspaper reporters are comfortably seated where they have no right. We have heard that convocation has passed a resolution calling the attention of the attorney-general to the abuse; but this appears to be unnecessary. The Bar have rights which the Courts should enforce and the matter may be remedied at any moment with very little trouble.

On the day to which we have referred another incident took place which should not pass without remark. After the Bar had submitted to the discomfort of being displaced from their seats by newspaper reporters, the latter made a demand upon the Court reporter for the judgment on the Board of Works case, and on appeal to Mr. Justice Robertson the latter surprised the Bar by requiring the reporter to wait upon the gentlemen of the press with the judgment in order that they might correct their notes. The learned Judge said, and truly said, that though the rules of the Law Society entitle the Court reporter to the judgment when delivered, a Judge need not give out his judgment at all. That may be so; but after he has given it out, we very much question his right to require any services of the reporter beyond these prescribed by the Society. The Judges are visitors of the Law Society, and as such have no right to ignore the rules for their own satisfaction, when they would be bound to enforce them as against others. The incident is an unusual one, and perhaps will not occur again; but it is doubly exasperating to be crowded out of one's seat and then have the trespasser taken under the wing of the Court.

BOOK REVIEWS.

Principles of the Common Law. Intended for the use of students and the profession. By JOHN INDERMAUR, Solicitor, Author of "Manual of practice," "Epitomes of leading cases," "Manual of the principles of Equity" etc., etc. Fifth edition, London: Stevens and Haynes, 1888.

The rapidity with which one edition of this work follows another is sufficient evidence of its value. The first edition was published in 1876. The book is largely used by students and as long as it does not become too voluminous will maintain its place. All successful books are liable to be extended in volume, but a book written primarily for educational purposes should be kept closely to immutable principles and its scope extended only for the purpose of illustration by cases.

The Quebec Legal Chart, also containing lists of the Judiciary and Barristers for New Brunswick, Nova Scotia, Manitoba, N. W. Territories, P. E. Island and British Columbia. 1888-89. Compiled by H. R. Hardy, Esq., of Osgoode Hall, Barrister-at-Law.

We have received this Chart, which is now well known, and answers the purpose of a Dominion Law List.

REVIEW OF EXCHANGES.

Law Journal.—4th February, 1888.

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he had so long lain unmolested, not a positive extinguishment of the obligation. If we find that this presumption grows stronger as the period of time extends from the entering of the judgment, and that the court at stated periods of protraction becomes more and more cautious of molesting the defendant, we are still minded that it is but a presumption that is to be got rid of, sometimes without notice to the debtor and on the creditor's own showing, sometimes after notice to him and hearing him plead. If we find that at no stage a positive final and conclusive barrier to execution is interposed, may we not conclude that a judgment never dies, in so far as the right to issue execution thereon is concerned? Payment of a debt cannot be made by presumption, but the right of action to remove the debt may be taken away by positive law. A substantive right, such as the right to recover property, cannot be taken away by a rule of practice. The procedure of the court being duly observed, the right must be recognized, the remedy given. The impression is almost universal that after a lapse of twenty years from the entry of a judgment it becomes effete. It may be a correct one, and is all the more likely to be correct on account of its universality. But if the reason for the impression were asked for, the answer would almost invariably be made, "it has always been understood to be so." It may be worth while, therefore, to enquire into the reason for the opinion and ascertain whether it rests upon any solid foundation.

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The meaning of this enactment is that if the execution was not sued out within a year and a day from entering the judgment or taking the recognizance, the plaintiff, instead of having his execution, was obliged or permitted to issue a *scire facias*, i.e., the sheriff was to give knowledge or notice to the defendant to show cause why execution should not issue, and if he did not appear, or if appearing he did not show cause, then the execution was to issue. The commentary upon this by Coke is as follows: "Some diversity of opinion hath been, whether there was a *scire fac'* at the common law before this act; and the doubt grew for want of distinguishing between personall actions, and reall actions; for true it is, that in personall actions, if the plaintife after judgement given, or recognizance acknowledged, sued out no processe of execution within the yeer, he could have no *scire fac'*; but the plaintife or conusee was driven to his originall, which is to be intended upon the judgement or recognizance, as in actions of debt, writs of annuity, or other personall actions, wherein debts or damages were recovered, or upon recognizances." And then after stating that in real actions the demandant after the year might have a *scire fac'* for the land because he could not have any new original writ, the learned commentator states that "now this Act giveth a *scire facias* in personall actions in lieu of a new originall."

courtesy. It has already been construed by Mr. Justice Street, who in a case of *Trust & Loan Co.* v. *Jones* tried at the Toronto Assizes on 14th May last, held that he had a discretion to determine the circumstances under which he might order a conveyance, that the Act allowed him to make a general order for permission to convey, and that it was not necessary that an actual sale should be either in progress or contemplation at the time of making the order.

EDITORIAL REVIEW.

The Bar and the Public.

During the last few months a good many matters affecting the civic affairs of Toronto have been before the courts, and in proportion to the interest which they have excited the court rooms have been more or less resorted to by the public and newspaper reporters. The presence of both in the court rooms is not a matter of comment; for seats are specially provided for the public and we may expect to find them occupied. What calls for remark is the fact that the seats provided for the public are not used by the reporters who prefer to invade the seats reserved for the bar to the discomfort and inconvenience of the latter.

On a recent day when Mr. Justice Robertson delivered judgment on the application to restrain Judge McDougall from proceeding with the Toronto Board of Works investigation, there were eleven newspaper reporters occupying the first and second rows of seats reserved for the bar, and several gentlemen of the bar who attended to hear judgment in other cases had to sit where they could, not where they would, in consequence. Heretofore the Bar has not insisted strictly upon its rights, nor on the other hand has it been dealt with strictly by the Courts. No objection has ever been made to strangers sitting amongst the members of the Bar, nor has the privilege ever been denied to Barristers or Solicitors not properly dressed of sitting in the accustomed seats, though it becomes a privilege only and not a right to sit there when the proper robes are not worn. However, the recent events which we have spoken of, have brought the matter prominently into view. The privilege of sitting within the seats of the Bar is being grossly abused. The accommodation for the Bar is not the best, but they decidedly

object to being driven from one place to another to look for seats when a dozen newspaper reporters are comfortably seated where they have no right. We have heard that convocation has passed a resolution calling the attention of the attorney-general to the abuse; but this appears to be unnecessary. The Bar have rights which the Courts should enforce and the matter may be remedied at any moment with very little trouble.

On the day to which we have referred another incident took place which should not pass without remark. After the Bar had submitted to the discomfort of being displaced from their seats by newspaper reporters, the latter made a demand upon the Court reporter for the judgment on the Board of Works case, and on appeal to Mr. Justice Robertson the latter surprised the Bar by requiring the reporter to wait upon the gentlemen of the press with the judgment in order that they might correct their notes. The learned Judge said, and truly said, that though the rules of the Law Society entitle the Court reporter to the judgment when delivered, a Judge need not give out his judgment at all. That may be so; but after he has given it out, we very much question his right to require any services of the reporter beyond these prescribed by the Society. The Judges are visitors of the Law Society, and as such have no right to ignore the rules for their own satisfaction, when they would be bound to enforce them as against others. The incident is an unusual one, and perhaps will not occur again; but it is doubly exasperating to be crowded out of one's seat and then have the trespasser taken under the wing of the Court.

BOOK REVIEWS.

Principles of the Common Law. Intended for the students and the profession. By JOHN INDERMAUR, tor, Author of "Manual of practice," "Epitomes of l cases," "Manual of the principles of Equity" et Fifth edition, London: Stevens and Haynes, 1888.

The rapidity with which one edition of this work another is sufficient evidence of its value. The first was published in 1876. The book is largely used dents and as long as it does not become too volu will maintain its place. All successful books are li be extended in volume, but a book written primar educational purposes should be kept closely to imm principles and its scope extended only for the purp illustration by cases.

The Quebec Legal Chart, also containing lists Judiciary and Barristers for New Brunswick, Nova Manitoba, N. W. Territories, P. E. Island and Columbia. 1888-89. Compiled by H. R. Hardy, E Osgoode Hall, Barrister-at-Law.

We have received this Chart, which is now well and answers the purpose of a Dominion Law List.

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In Gilbert on Execution (*b*) an explanation is given of the reason of delaying the plaintiff. It is there said, "And here we must note that wherever the parties to the judgment were charged, or a year and a day had passed, there no execution could be taken out without a *scire facias*, because there was a presumption in law, that such judgment might be discharged, or some compensation made by agreement instead of it, and therefore the parties had a day in court to answer thereunto. But this was originally only in real actions, for in personal actions they were obliged to begin their actions *de novo*, because the presumption was exceeding strong that the judgment was satisfied, and therefore after the year and a day, it only continued a debt, but it was not considered as judgment for execution; and the Statute of Westm. 2, cap. 45, gives a *scire facias* in the personal action, as well as the real. There is another reason for the law, because after the year and a day the plaintiff and defendant were brought out of court, for the defendant is out of Court by the judgment; for the warrant of attorney is *quousque placitum terminatur* (until the plea be determined), and the defendant's *placitum* is determined by the judgment; but as to the plaintiff he remains in court a year and a day, so that he may within that time acknowledge satisfaction. For a year and a day was thought a competent time to get execution of the judgment, as it was for all parties to claim upon the recoveror in the writ of right after the final judgment. And so long as the plaintiff was in Court by attorney, either to receive the money and acknowledge satisfaction upon record, or to take out process in order to get it, it is true the plaintiff may at any time acknowledge satisfaction on record, and make his attorney for that purpose; but if he call the defendant in to make satisfaction after the year, he was was obliged to have process of *scire facias*; because the defendant might have paid it to the attorney before the year and a day was out. But after the year and a day, they are both out of Court, for then

(*b*) Page 92.

the *placitum* was determined both as to the plaintiff and defendant, for they reckon the year and the day to be *finis litium* begun and moved in any court whatsoever, and as at first their judgment was given the same day the parties were brought in, so there was but a year and a day for the execution of it, and so long the pledges were obliged to bring in the party, and so long the plaintiff's attorney remained, and this was the time for any person that had a claim in the same thing to bring it in, and therefore, after that time all proceedings were said to be asleep, till they gave a new day to each other." And other authorities put it on the ground first stated by Gilbert. "The reason why the plaintiff is put to his *scire facias* after the year is because where he lies by so long after his judgment it shall be presumed that the judgment is executed, or that the plaintiff has released the execution, and therefore the defendant is not to be disturbed without being called upon, and having an opportunity of pleading that the judgment is executed, or the release, or showing if he can, why execution should not issue against him" (*c*).

That this delay is not a rule of positive application in all cases is evident from the case of *Mitchell* v. *Cue* (*d*) in which it is said, "The Court were unanimous that this rule of reviving a judgment of above a year old by a *scire facias* before suing out execution upon it, which was *intended* to prevent a SURPRISE *upon the defendant*, ought not to be taken advantage of by a defendant who so far from being *surprised* by the *plaintiff's* delay, that *he himself* had been trying all manner of methods whereby HE *might delay the plaintiff*; and therefore they not only discharged the rule but discharged it with *costs* too." The rule which is thus emphatically spoken of was a rule to set aside an execution for irregularity in suing it out above a year after the judgment, without any *scire facias* to revive the judgment, and it appeared that the delay had arisen from the defendants by filing bills in chancery for injunctions and by obtaining

(*c*) 2 Wms. Saund. 72 d; Bac. Ab., Tit. Execution (B) (2) (2).
(*d*) 2 Bur. 660.

time for payment. It is noticeable in this case that the presumption of payment did not arise. There was nothing for the plaintiff to rebut. The defendant was fully aware of all the circumstances and could not be surprised. If the rule respecting issue of a *scire facias* had been a positive rule of practice or law, the defendant could have successfully contested the point with the plaintiff, for he had a right of course to avoid all irregular process. But the rule, being invented for the protection of the defendant from surprise or molestation after presumed payment, ceases with the ceasing of the reason for it (*e*). So where a *fieri facias* was sued out but not executed, another *fieri facias* was allowed several years afterwards without a *scire facias*, continuances being entered meantime (*f*). And where there was judgment on a bond to secure quarterly payments of an annuity, and a *fieri facias* issued for arrears for the previous half year, it was held that a second *fieri facias* might issue for the next quarter's payment without reviving the judgment.

Another class of cases is shown by *Low* v. *Beart* (*g*), where a motion was made to set aside a *fieri facias*, the judgment being above a year old, and not revived by *scire facias* nor any continuances of *fi. fa.* entered on record. The plaintiff before cause shown entered the continuances and produced intervening writs of *fieri facias* to warrant the entries, and the rule was discharged (*h*). There must have been both returns entered and writs to warrant the returns, for in one case where there were no such returns a *capias ad satisfaciendum* was set aside for not reviving the judgment before issuing it (*i*).

The principle underlying all these cases seems to be that the plaintiff must have actually kept on the records of the Court some continuing evidence of the non-payment of the judgment of which the defendant was bound to take

(*e*) See Bac. Ab. Tit., *Scire Facias* (C) (1).
(*f*) *Welden* v. *Greg*, 1 Sid. 59.
(*g*) Barnes, 210.
(*h*) See also *Aires* v. *Hardress*, 1 Str. 100.
(*i*) See Tidd Pr. 1155, 8th Ed.

notice. But if the evidence was not kept on record the defendant was entitled to some other warning before execution was had against him, and this warning was the writ of *scire facias*.

And in "Gilbert on Execution, it is said that though there was a year and a day to execute a judgment, yet if there was execution taken out, and that was continued beyond the year, there was no occasion for a *fi. fa.*, for then at common law there was no presumption that the judgment was satisfied, because there appeared an execution taken out, and it was the default of the minister that the writ was not served" (*j*).

It is clear also from other cases that the plaintiff could proceed in some cases without the defendant having been personally informed of the *scire facias*. In *Lowe* v. *Robins* (*k*) Bosanquet, Sergt., said in his argument that it never had been the established practice to require any affidavit of personal service of notice till the cases of *Bagnall* v. *Gray* (*l*), and *Coysgarne* v. *Fly* (*m*).

Upon a like principle, when a conusee died before execution, his executor was not entitled even within the year to sue out execution without bringing a *scire facias* against the conusor, the reason alleged being that the law presumed that the debt might have been paid to the testator, and it would not therefore suffer the debtor to be molested unless it appeared that he had omitted to perform the recognizance (*n*).

Upon the defendant being warned by *scire facias* he was at liberty to appear and shew cause why the execution should not issue. He might show that there had been a release, or that the judgment had been executed (*o*), or that anything had been done under the original judgment

(*j*) Cited *Simpson* v. *Heath*, 5 M. & W. 621, and 3 Jur. 1129, where an evident correction in Gilbert's text is made.

(*k*) 1 Bro. & B. 381.

(*l*) 2 Bl. 1140.

(*m*) 2 Bl. 995.

(*n*) Tidd, Pr. 1146, 8th Ed.

(*o*) 2 Wm. Saund. 72 *d*; Tidd Pr. 1146.

which exonerated him from liability, as that his goods had been levied on under a *fieri facias* or a *distringas* (*p*); or he might plead fraud to the original judgment, but nothing that he might have pleaded in the original action which resulted in the judgment.

The mode of procedure to revive a judgment by *scire facias* is set out in Tidd's Practice (*q*) and is as follows:—

"If the judgment be under seven years old the plaintiff may in either Court [King's Bench or Common Pleas] sue out a *scire facias*, as a matter of course, on a proper præcipe without any rule or motion: if it be above seven years, but under ten, he cannot have a *scire facias*, without a side-bar or treasury rule. Formerly, if the judgment had been above ten years old, there must have been a motion to the Court in the King's Bench, supported by an affidavit of the debt being due, the judgment unsatisfied, and the defendant living; upon which the rule was absolute in the first instance, unless the judgment were of more than twenty years' standing, and then there must have been a rule to show cause. But now if the judgment be above ten and under fifteen years old, the rule is absolute in the first instance, on an affidavit of the debt being due, etc., and may be drawn up on a motion paper signed by counsel; if it be above fifteen years old, there must be a rule to show covet. In the Common Pleas, where the judgment is more than ten years old, the Court must be moved in term time for leave to issue a *scire facias* to revive it; and will order that no execution be taken out thereon, without a return of *scire feci* or an affidavit of personal notice to the defendant. * * * And if the judgment be above twenty years old there must be a rule to show cause" (*r*).

The deduction to be properly drawn from the foregoing authorities is that there was no positive rule of law limiting the time within which an execution might issue on a judg-

(*p*) *Clark* v. *Withers*, 2 Ld. Raym. 1075; and see *Holmes* v. *Newland*, 5 Q. B. 379.

(*q*) 28th Ed. 1186.

(*r*) Tidd Pr. 1186.

ment save the first period of a year and a day. If there had been such a positive rule we should have found it so expressed in some place, and moreover the Court of King's Bench and Common Pleas would alike have been bound to enforce it, whereas we find the safe-guards against molesting the debtor to differ in these two Courts, one being slightly more cautious than the other in allowing execution to issue. Secondly, it may be inferred that a judgment above twenty years old might have been revived by *scire facias*. For this we have the statement of Tidd just cited that in either the King's Bench or Common Pleas there must have been a rule to show cause why the judgment should not be revived if it were above twenty years old. It is remarkable that nothing is said in connection with this statement respecting payments or execution within the twenty years. The contents of the affidavit to be used on a motion to revive the judgment above fifteen years old are plainly stated to be that the debt is due, the judgment unsatisfied, and the defendant alive. Upon the affidavit the rule was made absolute in the first instance unless the judgment were over twenty years old, and then it was a rule to show cause. One would imagine that if the judgment were over twenty years old and it was a good answer to a *scire facias* to say that no payment had been made within twenty years, the court, so particular about protecting the debtor, would have required also an affidavit of payment within such period; for if the presumption of payment grew stronger as time advanced, and a more cautious treatment became necessary, an additional safe-guard would have been provided. And if the lapse of twenty years without a payment would have been a complete answer it is most unlikely that nothing would have been said about it until the *scire facias* had been sued and the issue thereon tried. Again, if the lapse of twenty years was a complete bar, the plaintiff could not truly swear that the debt was due and the judgment unsatisfied as he was bound to do before obtaining his rule.

It is true that in every case in which it was necessary to revive the judgment the process issued was a *scire facias*,

to which the defendant appeared and in due course pleaded; and he had therefore the opportunity of showing cause why execution should not issue. But it must be borne in mind at the same time that a plaintiff applying for a rule after the lapse of twenty years of necessity showed to the Court a circumstance of itself calculated to endanger his position if it were a defence to the *scire facias*. If the lapse of twenty years without payment was equivalent to a release or extinguishment of the right to enforce the judgment, the position of a plaintiff applying for a rule after the lapse of twenty years would be like that of a plaintiff exhibiting to the Court a release and asking for leave, notwithstanding, to enforce his judgment. And we have the statement of Tidd (*s*), that the rule as to applying for a *scire facias* was subject to the restriction that if execution were "taken out within the year, and not executed, a new writ of execution might be sued out at any time afterwards, without *scire facias*, provided the first writ be returned and filed and continuances entered from the time of issuing it."

There are some cases bearing directly upon the point, but they do not agree altogether. In *Coysgarne* v. *Fly* (*t*), on a judgment of above twenty years old, the Court, it is said, according to a precedent settled about nine years before the report, gave leave to the administrator *cum testamento annexo* of the plaintiff to sue out a *scire facias* to revive the judgment, but ordered that no execution should be taken out thereon, until either the sheriff made an actual return of *scire feci*, or an affidavit should have been made of personal notice being served on the defendant of the issuing of such *scire facias*. It is remarkable that in that case nothing is said about payment within the twenty years, and if there had been an absolute presumption of satisfaction at the expiration of the twenty years, the Court would have required something to rebut the presumption before issuing a useless *scire facias* and trying a useless issue.

(*s*) Pr., 8th Ed. p. 1155.
(*t*) 2 Bl. 995.

In *Williams* v. *Welch* (*u*), it was stated by counsel on one side that a rule *nisi* never issued for a *scire facias* on a judgment above twenty years old, and by counsel on the other side that there was no inflexible rule of the kind. Williams, J., said, "It seems to me that the general question whether there be any inflexible rule as to the allowance or disallowance of a *scire facias* after a lapse of twenty years does not arise, and as it is distinctly sworn that some payments have been made within the twenty years, this case would not fall within the rule, even supposing it to exist." This case was as late as 1846, and it serves two purposes: one to show that if payments had been made within the twenty years it was usual or prudent to show this to the Court, or usual for the Court to seek the information, and nothing of the kind appears in *Coysgarne* v. *Fly*. The other purpose is to show that the existence of the alleged rule was entirely hypothetical in the learned Judge's opinion.

But in a later case, *Loveless* v. *Richardson* (*v*), decided in 1856, Wightman, J., held that an affidavit which did not show payments within twenty years was insufficient to support a rule *nisi* for a *scire facias*.

And a case of *Doe dem. Reynell* v. *Tucket* (*w*), a rule *nisi* for a *scire facias*, on a judgment in ejectment, was refused in the first instance, after a lapse of twenty years, for the following reasons: "If a writ of possession had been originally sued out, the defendant might have brought another ejectment and recovered the possession. But now his witnesses may be dead. Here, too, there have been two descents, and the present possessors may not be aware, as the former possessors were, of the defects in the plaintiff's title. If we were to grant this rule, we should be giving encouragement to procrastination." And Bayley, J., said, "I cannot believe it possible that the plaintiff would for twenty years have delayed suing out a writ of possession,

(*u*) 3 D. & L. 565.
(*v*) 2 W. R. 617; 27 L. T. Rep. 92; 2 Jur. N. S. 716.
(*w*) 2 B. & Ald. 773.

unless he had been conscious of some fatal defect in his own title."

The change from the period of a year and a day to six years, within which execution might issue without leave, was made upon the recommendation of the Common Law Commissioners (*x*), and the period of six years was fixed upon by analogy to the Statute of Limitations affecting simple contract debts. The presumptions and consequences remain the same as before, with the exception of the lengthening of the time limit. The Common Law Procedure Act also required that if the judgment was less than ten years old a writ of revivor (which was substituted for a *scire facias*) should issue without any rule or order, if more than ten years old the writ should not issue without a Judge's order or rule of Court; if more than fifteen years old not without a rule to show cause.

Under this Act it was held that if execution were sued out, returned and filed within the six years the same consequences followed as formerly if the writ were issued within the year and day (*y*). This practice, as we have seen, enabled the plaintiff to issue execution at any time afterwards, if he once issued the execution within the year, had it returned and continuances entered. This practice, without the additional safeguards of application to the Court after a lapse of ten or fifteen years respectively, has been continued by the Judicature Act and rules, and now by the Consolidated Rules (*z*).

The result is that if execution be not issued within the six years, the plaintiff must obtain leave to issue the same, presumably on notice of motion, upon which the right is either determined or an issue to try the right directed. Thus the question arises, whether after the lapse of twenty years the Court will deny the right on the mere presumption of payment, and apparently they will (*a*), though there

(*x*) Har. C. L. P. Act 408.
(*y*) *Jenkins* v. *Kerby*, 2 U. C. L. J. N. S. 164.
(*z*) Rs. 885, *et seq.*
(*a*) *MacMahon* v. *Spencer*, 13 App. R. 430.

is no statutory limit within which the execution must be issued (*b*).

But if execution has been issued within the six years, and either allowed to expire or be returned *nulla bona*, is the right to execution barred in twenty years from the entering of the judgment, or in twenty years from the return or expiry of the writ?

Again, if execution is issued and kept renewed for twenty years without levy, payment or acknowledgment, is the judgment unaffected by lapse of time? Again, if execution were issued within the six years, and allowed to expire or were returned *nulla bona*, and no execution issued until just before the expiration of twenty years from the date of the judgment or the return or expiry of the first writ, would it keep alive the judgment as long as it was kept renewed?

With respect to the first question. If the execution has been issued within six years and has expired or been returned *nulla bona*, what right has the plaintiff? At common law, or rather under the statute of Westminster, if the execution was issued within the year and day and returned unexecuted and if continuances were entered, he could, according to Tidd, afterwards issue execution at any time. Tidd does not say at any time within twenty years, nor do we find any discussion as to whether the limit of twenty years, if there be any limit, is to be calculated from the entry of the judgment or from the return of the writ, a matter of considerable importance. Continuances having been abolished we may now venture to assert that if a writ has been issued within six years and returned *nulla bona*, the plaintiff is in the same position as if he had under the old practice issued his writ within the year and day, had it returned and entered the continuances. He may issue another execution at any time afterwards. The writ returned unexecuted would always be sufficient to rebut the presumption of payment which arose if the plaintiff did not issue the writ. And so the plaintiff might

(*b*) *McCullough* v. *Sykes*, 11 P. R. 337.

issue another writ at any time, and if the defendant sought to set it aside if issued after a lapse of twenty years he might be required to show that there was some other satisfaction than that by presumption, for in *McCulloch* v. *Sykes* (*c*) Rose, J., treats the presumption of payment as a rebuttable one.

Secondly,—if execution is issued and kept renewed without levy or payment, is the judgment unaffected by lapse of time? We have seen that the return of a writ unexecuted and entry of continuances kept the judgment alive as against the defendant, and absolved the plaintiff from the necessity of reviving the judgment. So, an agreement to delay payment, or a perverse delay by the defendant, or a waiver of the limitation upon the plaintiff worked a similar absolution, or was equivalent to an acknowledgment of the debt by the defendant. We say equivalent to an acknowledgment, for, as the rule operated to prevent the defendant from molestation and surprise in the fear that he might have paid the debt, the agreement to delay, or his perverse action showed that he could not be surprised, for his action manifested his acknowledgment of the debt, and, if the return of a writ unexecuted, which has been issued within the first time limit, rebutted the presumption of payment, and entitled the plaintiff without leave to issue another writ, how much more should the renewing of a writ rebut the presumption of payment; and thus it would operate in the same way as a perpetual acknowledgment. Again, the rule of Court respecting renewal of writs declares that the writ when renewed shall have effect and be entitled to priority according to the time of the original delivery thereof (*d*). It seems reasonably certain, then, that a writ issued within the six years and kept renewed will keep the judgment alive forever, though no levy may be made or payment or acknowledgment received.

Thirdly, what is the effect of issuing a writ, allowing it to expire or be returned *nulla bona*, and then issuing a

(*c*) 11 P. R. at p. 344.
(*d*) C. R. 894.

second writ during the period of twenty years from the judgment? It is plain that this is not so much a question of principle as one of degree. If the *alias* writ were issued immediately after the lapse of the sixth year there would be no question of its validity and vigour, and if constantly renewed would be as effectual as if the original writ had been kept renewed. The plaintiff's right is just as good at the moment before the expiration of the twenty years as at the first moment after judgment entered; and the issue of the *alias* writ on the last day of the twenty years would be as effectual as its issue in the seventh year. If then a writ issued within the six years and kept renewed will keep the judgment alive, an *alias* writ issued within the twenty years and kept renewed should have a like effect.

In all these cases, it will be observed, there can be no imputation of laches or delay against the plaintiff. There is no presumption against him, and the existence of a writ in full force and vigour at the expiration of twenty years from the date of the judgment entirely disposes of the only reason which can be alleged against the right of the plaintiff to recover, viz., the presumption of payment arising from delay.

Then, is time to be computed from the date of entering the judgment or from the return or expiry of a writ issued thereon? It seems reasonably clear that under the practice of the Common Law Procedure Act, if no execution was issued within the six years, and there was an order to revive the judgment, this order was regarded as conferring a new right upon the plaintiff, and time was computed therefrom (*e*). This was by analogy to the practice of *scire facias*. Though the *scire facias* was in one sense a continuation of the former action, it was considered to be an entirely new proceeding, and conferred a new right upon the plaintiff when judgment was signed thereon. Time therefore was computed from the adjudication of the new right. The writ of revivor was substituted by the

(*e*) *McCullough* v. *Sykes*, 11 P. R. 337.

Common Law Procedure Act for the writ of *scire facias*, and the consequences were the same. No change has been made in the law by the Judicature Act and Rules, or by the Consolidated Rules. Instead of the writ of revivor there is a simple application to the Court. The practice is different but the principle is the same. Hence, if no execution is issued within the six years whereby it becomes necessary to apply to the Court for leave to issue execution, and an order for execution is made, a new right is acquired thereby, and time is computed from the date of the order. The plaintiff may therefore issue execution thereafter subject to the same rules as if the order were a judgment.

Suppose, however, that after the issue and expiry of a writ within the six years, an *alias* writ is issued after the six years, but within the twenty years, and is returned *nulla bona* or expires, is time to be computed from the the entry of the judgment or from the expiry or return of the last writ? In order to answer this question we must return to the early practice. The presumption of satisfaction arose after a year and a day without issue of a writ. The presumption did not arise if there was an express agreement for delay, or if the defendant perversely delayed the issue of the writ, or if he waived the time limit. In each case his own acknowledgment prevented the presumption from arising. But there was an equivalent. The issue of a writ within the year and its return unexecuted equally prevented the presumption from arising. In succeeding times, for instance in the case of *Loveless* v. *Richardson*, already referred to, the Court required proof of payments or acknowledgments within the twenty years from entry of the judgment before granting the rule for a *scire facias*, if there had been no writ issued. Now it is clear that under all the varying machinery for enforcing judgment, there has been the same living principle that existed when the Statute of Westminster was passed. There must either be an acknowledgment or payment by the defendant, or there must be something done by the plaintiff to prevent the arising of a presumption against him of

payment; and if a writ unexecuted was sufficient under the old practice it should be sufficient now. If it was the equivalent of an acknowledgment then it should be the equivalent of an acknowledgement now. And so time would be computed from the return or expiry of a writ unexecuted.

It must be borne in mind when considering this subject that there is no statutory or other positive time limit which extinguishes the right or takes away the remedy. It is simply a presumption of satisfaction which may or may not arise according as the plaintiff may be dilatory or diligent. And against a plaintiff who is constantly asserting, or who even but once asserts actively his right and manifests his diligence by the issue of execution, there cannot be any presumption which either arises at, or relates back to a period before, the issue of his writ.

(To be concluded.)

EDITORIAL REVIEW.

Exhibits.

Under the old common law practice exhibits were retained in the custody of the Court until an order for their delivery out had been made. In Chancery they were either retained by the party, or if important in the disposition of the case, left with an officer for perusal and consideration by the judge, and after judgment delivered out to the parties whose property they were at the time of trial. Now, by Rule 685 the exhibits are not to be delivered out without order or consent of parties.

In neither the Chancery practice, nor the common law practice was any enquiry made as to whether any disposition of the exhibits themselves had been made, and in the delivery out of the exhibits the only guide consulted was the labelling of the exhibits. In a recent case, the judgment directed the plaintiff to deliver to the defendant a promissory note for $1,000 which the plaintiff had sued on, and that a certain agreement for sale of land, of which the note was part of the consideration, should be cancelled. The officer who was in charge of the exhibits, and who never allows them to accumulate in his office, on the next day following the judgment delivered back both note and agreement to the plaintiff, without an order, as the action was tried in the Chancery Division. They were labelled the property of the plaintiff, but the property in one document had been changed by the judgment, and in the other, destroyed. This might also have occurred under the common law practice; and we would therefore suggest that in future before an order for delivery out of exhibits is made there should be an affidavit touching as well the ownership of the exhibits as the fact of the ending of the action.

The Proposed Law School.

Such an apparent effort was made to establish a law school upon some sort of rational basis during the early part of the year, that great hopes were entertained of arriving at a successful result before its end.

The interest in the scheme, however, seems to have died away, and the old law school, which was prematurely born, crippled from its infancy, and racked with age, has been set up on its legs again for a year.

In the meantime the scheme of establishing a teaching faculty of law at Toronto University seems, in the absence of any probability of a determined effort on the part of the Law Society, to be the only present feasible one. Though no proceedings have been made public, it was recently stated in the newspapers that there would be a fully equipped teaching faculty at Toronto University by the first of October. Certainly, whether it was or was not a vain boast, it showed a more enterprising spirit than has been shown by the Law Society; and if the latter body does not bestir itself it will earn the rebuke so often administered to lawyers, that they stand with drawn swords against the admission of any reforms.

The Consolidated Rules.

The *Canada Law Journal* of 1st August, 1888, criticises the Consolidated Rules in a manner which reminds one of a story which must be told in the delicious language of the *Spectator*:—"A famous critic having gathered together all the faults of an eminent poet, made a present of them to Apollo, who received them very graciously, and resolved to make the author a suitable return for the trouble he had been at in collecting them. In order to do this he set before him a sack of wheat, as it had been just threshed out of the sheaf. He then bid him pick out the chaff from among the corn, and lay it aside by itself. The critic applied himself to the task with great industry and pleasure, and after having made the due separation was presented by Apollo with the chaff for his pains."

BOOK REVIEWS.

A Digest of the reported decisions in the Supreme Court of New Brunswick, from Hilary Term, 42 Victoria, 1879, to Easter Term, 49 Victoria, 1886, with digest of cases in Canada Supreme Court decided on appeal from Supreme Court of New Brunswick, with Rules of Court from 1881 to 1886, in continuation of "Stevens' Digest," by JAMES G. STEVENS, Esq., Q. C., one of the judges of the County Courts of New Brunswick. Toronto: Carswell & Co. 1888.

This work, must as a digest, depend for its value upon its arrangement. So far as one can judge from a glance through it the order and classification is good, with one exception. The digest of cases appealed to the Supreme Court of Canada would in our opinion have been better, not as a separate arrangement, but as an integral part of the work. For instance, in seeking for constitutional cases we would naturally look under that head in the digest instead of amongst the cases in the addenda. Familiarity with the arrangement would, however, overcome this difficulty.

The American State Reports, containing the cases of general value and authority, subsequent to those contained in the "American Decisions," and the "American Reports," decided in the Courts of last resort of the several States. Selected, reported, and annotated by A. C. FREEMAN, and the associate Editors of the "American Decisions." Vol. I. San Francisco: Bancroft-Whitney Company, 1888.

Most of us are familiar with the Decisions and Reports of which this series is a continuation. It is in reality the result of a process of weeding, and gives us the best of the general law embodied in the various reports. The value of

such a work depends entirely upon its wide circulation, for it is useless to cite from reports which are limited in range. Its circulation depends upon two things, the price and the quality of the work. The former is low and the latter high, and thus we have the happy combination that at once makes the work sell and renders it of practical value to the profession.

Reports of cases adjudged and determined in the Court of Chancery of the State of New York. Complete edition, copiously annotated by embodying all equity jurisprudence, with tables of cases reported and cited, by ROBERT DESTY. Book I., containing Johnson's Chancery Reports, vols. 1, 2, 3, 4 & 5. The Lawyers' Co-operative Publishing Company: Rochester, New York, 1888.

This is a reprint of the reports with annotations, the latter being the chief original work in the publication. Its principal feature is that it reduces the price of the reports to a nominal sum by reason of the large amount which is compressed into one book.

Treatise on Patent Estate, comprehending nature, conditions and limitations of interest in letters patent. By THOS. B. HALL, of the Cleveland Bar. Cleveland: Ingham, Clarke & Co. 1888.

This little work keeps closely and logically to its scheme as noted in the title page. A little more extended text would make it more easily readable. Many of the sentences are little more than "notes" in their form and composition. Where this is the case we would suggest to the learned author that in another edition a reference should immediately follow containing the authority.

REVIEW OF EXCHANGES.

Albany Law Journal.—15th October, 1887.

The Highway as a Boundary, by CHARLES C. MARSHALL. A good many American cases are cited on this subject.

Ibid.—22nd October, 1887.

Contributory Negligence, by WM. A. HAGGERTY. "It may well be doubted whether there is such a thing as contributory negligence as distinguished from negligence itself. The sole object of inquiry in every case is to discover the proximate cause of the injury, and having found it to place the blame upon its author. If the defendant's negligence be the proximate cause of the injury, he is responsible whether the plaintiff has been negligent or not; and it is immaterial whether any third person, parent, guardian, custodian or otherwise, has been negligent, if the defendant be the author of the *proximate* cause of the injury. These views are consistent with all the cases."

Ibid.—19th November, 1887.

How far Judgment against Principal is Evidence against Surety, by GUY C. H. CORLISS. The cases in which it has been held that the surety is bound by the judgment against the principal, are cases of official bonds, such as those given by executors, guardians, committees or others of a like nature, or where the surety has expressly agreed that he shall be so bound.

Ibid.—24th December, 1887.

Officer de facto where there is no Office, by GUY C. H. CORLISS. The majority of cases go to show that there cannot be an officer *de facto* where there is no office *de jure*.

Ibid.—21st January, 1888.

Mortgages as Choses in Action, by HENRY T. TERRY. A few American cases are cited.

Ibid.—11th February, 1888.

When Surety is Liable for more than Penalty of a Bond, by GUY C. H. CORLISS. A majority of the American cases hold that where the surety is in default interest may be recovered upon the sum for which he is in default, although this increases the total recovery to an amount exceeding the penalty of the bond. The English rule does not allow the penalty to be exceeded. The reasoning of the American

rule is this: "The liability is the debt: the penalty, the limit of that liability; and the interest, the damages for not meeting and discharging that liability when it becomes due."

Ibid.—19th February, 1888.

Hearsay Evidence to Prove Pedigree, by W. W. THORNTON. A number of English and American cases are cited on the subject.

Ibid.—10th March, 1888.

Surety's Liability on Bond Conditionally Signed, by GUY C. H. CORLISS, concluded in the following number. A great number of authorities are cited, and a number of conclusions in the form of rules deduced therefrom, the chief of which are as follows: "A surety who signs a bond on condition that the same shall not be delivered unless others execute it, is nevertheless bound, although the bond is delivered by the principal obligor without securing the required signature, provided the obligee has no notice, actual or constructive, of the condition. If the obligee has actual notice of the condition, or notice of facts sufficient to put him upon an inquiry as to the existence of a condition, the surety is not bound. The fact that the name of the person appears in the bond who has not signed the bond, is sufficient to put the obligee upon inquiry as to the existence of the condition, and the surety is not bound."

Ibid.—5th May, 1888.

The Dog, in Law and Elsewhere, by W. D. ELLWANGER. A few American cases are cited.

Ibid.—12th May, 1888.

Blasphemy. This offence is still punishable in England and in many of the States.

American Law Register.—October, 1887.

The Responsibility of Principals for the Malicious Torts of Agents, by GLENN H. WORTHINGTON. The learned writer extracts the following rule from the cases: "That the employer or principal shall be responsible in all cases where the injury to the third person might have resulted from the negligence or unskilfulness of the servant whilst in the immediate pursuit of his master's business, though in fact it did not, but was occasioned by the wilfulness or maliciousness of the servant whilst so employed." For instant, if a servant while driving his master's carriage were maliciously to drive against another, the master should be held responsible, because it might have occurred through carelessness. But if the servant were while so driving to cut maliciously at another horse with his whip, the master would not be liable, because it could not have been done carelessly.

American Law Review.—November-December, 1887.

The System of Trial by Jury, by SAM. P. MILLER. A few remarks upon trial by jury, in which the learned writer says that, "as a method of ascertaining the matter in regard to disputed questions of

fact, a jury is in the main as valuable as an equal number of Judges would be, or any less number." But they must be subject to the competent supervision of the bench, the want of which has done much to detract much from the value of the system.

The Dissenting Opinions of Mr. Justice Daniel, by H. B. BROWN. The opinions of this learned Judge in several important constitutional matters are referred to.

Effect of Assignor's Fraud upon an Assignment for the benefit of Creditors, by MORRIS M. COHN. After an exhaustive review of the authorities the learned writer concludes as follows: "Upon the whole, it seems to me that in principle, where statutory provisions do not exist, modifying the law in this regard, where an assignment for creditors has been made without the priority of creditors, with a sufficiently fraudulent intent on the part of the assignor, it is bad as to any creditor who is entitled to attack it, without reference to the intent of the assignee, if he be not a creditor, and as to creditors seeking to claim under it after the liens of the attacking creditors have accrued; but if the creditor assent to it with notice of circumstances sufficient to put him on enquiry regarding its fraudulent character, it would be bad in his hands even after assent; that if the assignment was in that form that the assenting creditors were not required to give anything or surrender anything of value, or change materially their *status* in order to claim under it, their innocence of fraud or want of knowledge would be immaterial, and that the assignee is not to be regarded, except to the extent that he has given something of value, a purchaser for value."

Delegation of Powers and Trusts, by A. H. MARSH, concluded in the following number. "The general rule," says the learned writer, "may perhaps be sufficiently expressed as follows: No person occupying a fiduciary or *quasi* fiduciary position, shall, in the absence of express authority so to do, be permitted to delegate to another the right to exercise the discretionary functions of such position, except in cases of necessity, or of convenience amounting almost to necessity, and any act involving an exercise of discretion, when done in pursuance of such delegation, shall be invalid." The rule applies to trustees, brokers, liquidators, directors of a company, corporations, testators (for they cannot leave to others the power to make wills for them), judicial officers, legislatures whose powers are limited, municipal corporations, and the Crown in the exercise of the royal prerogative. The effect of delegation of a trustee's powers is to leave the trust property which has been conveyed subject to the trust, and to continue the personal liability of the trustee for the acts of the grantee in connection with the trust.

The Medical Jurisprudence of Inebriety, by CLARK BELL. The position of a drunkard is outlined in his civil relation, his criminal relation, *i.e.*, as a person to be accorded protection from himself, and from whom society is to be protected. It is observed that the law has not yet judicially recognized inebriety as a disease except in the cases of *delirium tremens*, and hardly even in that case.

THE

CANADIAN LAW TIMES.

OCTOBER, 1888.

HAS THE 29TH ARTICLE OF THE TREATY OF WASHINGTON BEEN TERMINATED?

THE message of President Cleveland to Congress, transmitted on the 23rd of August last, recommends immediate legislative action conferring upon the executive the power to suspend by proclamation the operation of all laws and regulations permitting the transit of goods, wares, and merchandise in bond across or over the territory of the United States to or from Canada.

A bill to give effect to the President's recommendation has been introduced in the following form:—

"Be it enacted, etc., That whenever the President may deem it his duty to exercise any of the powers given to him by an Act entitled 'An Act to authorize the President of the United States to protect and defend the rights of American fishing vessels, American fishermen, American trading and other vessels in certain cases and for other purposes,' approved March 3, 1887, it shall be lawful for the President in his discretion, by proclamation to that effect, to suspend in whole or in part the transportation across the territory of the United States in bond and without the payment of duty of goods wares and merchandise imported or exported from any foreign country from or to the British Dominions in North America."

It is not within our province to discuss the expediency of the threatened legislation or the motives inducing the President to ask for the same, or the evils which will result therefrom, but we may legitimately inquire whether it is within the power of the United States to give effect to any such legislation without breach of those rules which in times of peace are supposed to govern international relations as between civilized communities, and this is the question with which we propose to deal.

The rights of Canada and the obligations of the United States, in respect of the matter in question, arise under the Treaty of Washington, concluded between Her Majesty the Queen and the United States in 1871. The first seventeen articles of that Treaty deal solely with what were known as the Alabama claims; articles eighteen to twenty-five, both inclusive, deal solely with the fisheries question, and these, together with articles thirty-two and thirty-three are known as the Fishery Articles; article twenty-six deals with the navigation of the River St. Lawrence and certain other rivers; article twenty-seven deals with the right of user of the Welland, St. Lawrence, St. Clair and other canals; article twenty-eight deals with the navigation of Lake Michigan; article twenty-nine, with which we are chiefly concerned, deals with the transportation from the United States into Canada and from Canada into the United States of goods in bond, free from duty; article thirty confers upon British subjects the right, upon certain conditions, to carry goods in British vessels, without payment of duty, from one port within the United States to another port therein, and confers a similar privilege upon American citizens as to British ports in North America; articles thirty-four to forty-two, both inclusive deal with the boundary question, involving the right to San Juan.

We thus see that the treaty deals with a great variety of questions, some of which are thereby permanently settled, while others are settled for a terminable period only. With regard to the latter, and for the purpose of preventing repetition, article thirty-two was inserted, which article provides a method for terminating the terminable articles, and

it was the use of this article, for the purpose aforesaid, which affords the peg whereon President Cleveland hangs the argument contained in his message, supporting his recommendation hereinbefore set forth.

The Fishery Articles aforesaid gave to American fishermen "for the term of years mentioned in article XXXIII of this treaty" certain liberties which were not secured to them by the Convention of 1818, and further provided for the arbitration, which resulted in the Halifax Award, whereby an annual money payment was ordered to be made by the United States to Canada during the continuance of the fishery liberties so acquired.

The said article thirty-three is in the following words:—

"The foregoing Articles XVIII. to XXV. inclusive, and Article XXX. of this treaty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada and by the Legislature of Prince Edward's Island on the one hand, and by the Congress of the United States on the other. Such assent having been given, the said articles shall remain in force for the period of ten years from the date at which they come into operation; and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; each of the high contracting parties being at liberty to give such notice to the other at the end of the said period of ten years or at any time afterward."

Article twenty-nine of the treaty is the one which gives to Canada certain rights and imposes upon the United States certain obligations with regard to the transmission of goods in bond across or over the United States, to or from Canada, and this article, being one of the terminable articles above mentioned, refers to article thirty-three for the purpose of limiting its duration. It is in the words following:—

"It is agreed that *for the term of years mentioned in article thirty-three* of this treaty, goods, wares or merchandise arriving at the ports of New York, Boston and Port-

land, and any other ports in the United States, which have been, or may from time to time be, specially designated by the President of the United States and destined for Her Britannic Majesty's possessions in North America, may be entered at the proper custom house and conveyed in transit, without the payment of duties through the territory of the United States under such rules, regulations and conditions for the protection of the revenue as the Government of the United States may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit, without the payment of duties, from such possessions through the territory of the United States for export from the said ports of the United States.

"It is further agreed that, *for the like period*, goods, wares or merchandise arriving at any of the ports of Her Britannic Majesty's possessions in North America and destined for the United States may be entered at the proper custom house and conveyed in transit without the payment of duties through the said possessions under such rules and regulations and conditions for the protection of the revenue as the Government of the said possessions may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit without payment of duties from the United States through the said possessions to other places in the United States, or for export from ports in the said possessions."

President Cleveland expresses the opinion that the "term of years mentioned in article thirty-three," referred to in article twenty-nine as the limit of its duration, means the period during which the "fishery articles" should continue in force under the language of said article thirty-three; that is, he contends that the "fishery articles" and article twenty-nine must stand and fall together, and that any action which would terminate the operation of the "fishery articles" would *ipso facto* terminate the operation of article twenty-nine without the necessity for any express reference being made thereto.

We submit that this is not a correct interpretation of the articles in question, but that the effect thereof is that article twenty-nine is to remain in force for the period of ten years from the date of its coming into operation, and further until the expiration of two years after either of the high contracting parties shall have given notice to the other of its wish to terminate the same; that is, it was within the power of either of the high contracting parties to terminate the "fishery articles" and leave article twenty-nine operative, or to terminate article twenty-nine and leave the "fishery articles" operative.

Article thirty-three is the article which names the fixed period during which the terminable articles of the treaty shall, in any event, remain in force, and provides a method for terminating such articles after the lapse of such fixed period.

The various terminable articles are by their wording limited in their operation to such fixed periods *plus* any further time which may elapse before they are brought to an end in the manner provided, and this is effected by limiting the operation of each of them "for the term of years mentioned in article thirty-three."

It was evidently intended that certain of the terminable articles should stand and fall together, that is, that the one could not be terminated without at the same time putting an end to the other, and *this was effected by expressly enumerating in article thirty-three those articles which must so stand and fall together*, while *the terminable articles which were intended to stand independently were not enumerated in article thirty-three.*

The limiting phrase "for the term of years mentioned in Article XXXIII." is inserted in the "fishery articles;" in article twenty-eight, relating to the navigation of Lake Michigan; in article twenty-nine, relating to the transportation from the United States into Canada and from Canada into the United States of goods in bond free from duty; and in article thirty, relating to the transit of goods in British vessels, without payment of duty, through American territory, from one American port to another.

Article thirty-three, which provides for the termination of the terminable articles, expressly enumerates the "fishery articles" and article thirty, and thereby indicates that these enumerated articles are to stand and fall together, but it makes no mention of article twenty-eight or article twenty-nine, and it is thereby indicated that these articles stand independently and that they are not to be terminated *ipso facto* in the event of the articles enumerated in article thirty-three being brought to an end, but that one or both of them may be terminated either along with or independently of the "fishery articles" by giving the notice called for by article thirty-three.

President Cleveland cites in support of his opinion an entry made by the Joint High Commissioners, who negotiated the Treaty of Washington, in a statement containing an account of their negotiations, which entry is as follows: "The transit question was discussed, and it was agreed that any settlement that might be made should include a reciprocal arrangement in that respect for the period for which the fishery articles should be in force."

When we remember that before and at the time of the negotiation of the Treaty of Washington both the United States and Canada had statutes which effected the same purpose as that effected by article twenty-nine of the treaty, and that they had no such statutes effecting the purposes which were effected by article thirty of the Treaty relating to the transit of goods in British vessels, without payment of duty, through American territory, from one American port to another, and when we remember that by the express wording of article thirty-three the "fishery articles" and article thirty were made to stand and fall together, while article twenty-nine was not therein enumerated, we are forced to the conclusion that the transit question referred to in the entry by the Joint High Commissioners was the one which was dealt with in article thirty of the treaty and not the question which was dealt with in article twenty-nine.

This view is strengthened by the fact that there is no pretence that the Joint High Commissioners intended that

article twenty-eight, relating to the navigation of Lake Michigan, should remain in force so long only as the fishery articles should remain in force, although the clause as to duration contained in article twenty-eight is identical in form with that contained in article twenty-nine.

In 1883 a joint resolution of the Senate and the House of Representatives was adopted directing the President to give the necessary notice to Her Britannic Majesty for the purpose of terminating certain of the terminable articles of the Treaty of Washington, and accordingly a notice pursuant thereto was given which brought the said articles to an end on the first of July, 1885.

The wording of this joint resolution and of the notice given pursuant thereto clearly shows that Congress had no intention of terminating any of the articles of the treaty other than those enumerated in the resolution, namely, the "fishery articles" and article thirty. The joint resolution was in the words following:

"Resolved, by the Senate and House of Representatives of the United States of America in Congress assembled, that in the judgment of Congress the provisions of *articles numbered eighteen to twenty-five inclusive and of article thirty* of the treaty between the United States and Her Britannic Majesty for an amicable settlement of all causes of difference between the two countries, concluded at Washington on the eighth day of May, *anno Domini* eighteen hundred and seventy-one, ought to be terminated at the earliest possible time and be no longer in force; and to this end the President be, and he hereby is, directed to give notice to the Government of Her Britannic Majesty that *the provisions of each and every of the articles aforesaid* will terminate and be of no force on the expiration of two years next after the time of giving such notice.

"Sec. 2. That the President be, and he hereby is, directed to give and communicate to the Government of Her Britannic Majesty such notice of such termination on the first day of July, *anno Domini* eighteen hundred and eighty-three, or as soon thereafter as may be.

"Sec. 3. That on and after the expiration of the two years' time required by said treaty *each and every of said articles* shall be deemed and held to have expired and be of no force and effect, and that every department of the Government of the United States shall execute the laws of the United States (in the premises) in the same manner and to the same effect as if said articles had never been in force; and the Act of Congress approved March first, *anno Domini* eighteen hundred and seventy-three, entitled "An Act to carry into effect the provisions of the treaty between the United States and Great Britain, signed in the city of Washington the eighteenth day of May, eighteen hundred and seventy-one, relating to the fisheries," *so far as it relates to the articles of said treaty so to be terminated*, shall be and stand repealed and be of no force on and after the time of the expiration of said two years."

We can well imagine, though words could scarcely decribe, the violence of the storm of indignation which would have raged throughout the United States, had Canada, contrary to the wishes of the Americans, attempted to act upon the contention that such a resolution and such a notice had effected the termination of article twenty-nine.

President Cleveland says: "Without basing our complaint upon a violation of treaty obligations, it is nevertheless true that such refusal of transit and the other injurious acts which have been recited constitute a provoking insistance upon rights neither mitigated by the amenities of national intercourse nor modified by the recognition of our liberality and generous considerations."

As President Cleveland does not base his argument upon any alleged violation of the treaty by the Canadians, it will be unnecessary for us to deal with this question which is loudly harped upon by those Americans who see the weakness of the President's legal argument. The alleged breach of treaty obligations on the part of the Canadians consists in the enforcement by Canada of the British interpretation of the Convention of 1818 when read together with article twenty-nine of the treaty of Washington. The Americans contend that article twenty-nine so far modifies the conven-

tion of 1818 as to entitle them to certain privileges, connected with the fisheries, which privileges are denied to them by the British authorities. A discussion of this question would be beyond the scope of the present article and for the reason above mentioned it is unnecessary.

President Cleveland pins his faith chiefly to an argument which is doubtless all-sufficient for American Custom House Officers and other American officials but which as between the high contracting parties to the treaty can have no force whatever. After stating his view of the interpretation of the treaty, he says :— "It will be found that the law passed by Congress to carry the treaty into effect furnishes conclusive proof of the correctness of such construction," and after stating his view that there appears to be no conflict between the treaty and the said Act of Congress he says that "it is not necessary to invoke the well settled principle that in case of such conflict the statute governs the question." Doubtless the Statute does govern the question in so far as the domestic affairs of the United States are concerned, and the United States Courts and officers and people must hold themselves bound by the Statute so long as it remains in force, but when the question is dealt with from an international stand point the Statute has nothing to do with the case.

Article thirty-three of the treaty provides that articles eighteen to twenty-five inclusive and article thirty shall take effect as soon as the laws required to carry them into operation shall have been passed by the Imperial Parliament of Great Britain, by the Parliament of Canada and by the Legislature of Prince Edward Island on the one hand, and by the Congress of the United States on the other. Congress accordingly passed a Statute, the first section of which is as follows :—

"An Act to carry into effect the provisions of the treaty between the United States and Great Britain, signed in the City of Washington the eighth day of May, eighteen hundred and seventy one, relating to the fisheries.

Sec. 1. Be it enacted by the Senate and House of Representatives of the United States of America in Congress

assembled, That whenever the President of the United States shall receive satisfactory evidence that the Imperial Parliament of Great Britain, the Parliament of Canada and the Legislature of Prince Edward Island have passed laws on their part to give full effect to the provisions of the treaty between the United States and Great Britain signed at the city of Washington on the eighth day of May, eighteen hundred and seventy one *as contained in articles eighteenth to twenty-fifth inclusive and article thirtieth of said treaty*, he is hereby authorized to issue his proclamation declaring that he has such evidence, and thereupon from the date of such proclamation, and so long as the said articles eighteenth to twenty-fifth inclusive, and article thirtieth of said treaty shall remain in force, according to the terms and conditions of article thirty-third of said treaty, all fish oil, and fish of all kinds (except fish of the inland lakes, and of the rivers falling into them, and except fish preserved in oil) being the produce of the fisheries of the Dominion of Canada or of Prince Edward Island, shall be admitted into the United States free of duty."

The third section of the said Statute attempts to put a construction upon the treaty by enacting in effect that the twenty-ninth article shall be and remain in force so long only as articles eighteen to twenty-five and article thirty shall remain in force. It is worded as follows:—

"Sec. 3. That from the date of the President's proclamation authorized by the first section of this Act and *so long as the articles eighteenth to twenty-fifth inclusive and article thirtieth of said treaty shall remain in force*, according to the terms and conditions of article thirty-third of said treaty, all goods, wares, or merchandise arriving at the ports of New York, Boston and Portland and any other ports in the United States which have been, or may from time to time be, specially designated by the President of the United States and destined for her Britannic Majesty's possessions in North America, may be entered at the proper custom house and conveyed in transit without the payment of duties through the territory of the United States under such rules, regulations and conditions for the protection of the

revenue as the Secretary of the Treasury may from time to time prescribe; and under like rules, regulations and conditions, goods, wares or merchandise may be conveyed in transit without the payment of duties from such possessions, through the territory of the United States for export from the said ports of the United States."

It is to be noted that the Act of Congress does not attempt to put any construction upon article twenty-eight relating to the navigation of Lake Michigan, although the clause as to duration contained in article twenty-eight is identical in form with that contained in article twenty-nine.

The first statute passed for the purpose of carrying into operation the provisions of the Treaty of Washington was that passed by the Parliament of Canada (35 Vict. cap. 2), which recites that by the said treaty it is provided that articles eighteen to twenty-five inclusive relating to the fisheries shall take effect as soon as the laws required to carry them into operation shall have been passed, etc., and section three enacts as follows:—"Goods, wares and merchandise arriving at any of the ports of Canada, and destined for the United States of America, may be entered at the proper custom house, and conveyed in transit without the payment of duties, through Canada, under such rules, regulations and conditions for the protection of the Revenue, as the Governor in Council may from time to time prescribe; and, under like rules, regulations and conditions, goods, wares, and merchandise may be conveyed in transit without payment of duties, from the United States through Canada, to other places in the United States or for export from ports in Canada."

The next statute passed for a like purpose was that passed by the Legislature of Prince Edward Island, which was followed by a statute of the Imperial Parliament, (35 & 36 Vict. cap. 45), reciting the signing of the Treaty of Washington, which treaty contained among other things the articles set forth as a schedule to the Act, and reciting that the Dominion of Canada and the Legislature of Prince Edward Island had passed Acts for the purpose of carrying

into effect the said articles, and that the Congress of the United States had not yet passed any Act for carrying into operation the said articles on the part of the United States, and that it was expedient to make provision by Act of Parliament for carrying into operation the said articles. The Imperial Statute in the first section thereof then enacts as follows: "As soon as the law required to carry into operation, on the part of the United States of America, the articles set out in the schedule of this Act has been passed by the Congress of the United States and come into force, all Acts of Parliament and laws which operate to prevent the said articles from taking effect, shall, so far as they so operate, be suspended and have no effect during the period mentioned in the article numbered thirty-three in the schedule to this Act."

The schedule in question then sets forth verbatim articles eighteen to twenty-five inclusive and articles thirty to thirty-three inclusive of the Treaty of Washington.

If the Imperial Statute had included article twenty-nine in the schedule in question, then as the Imperial Statute was not to become operative until the law required to carry into operation on the part of the United States the articles set out in the schedule to the Act had been passed by Congress and come into force, and as the Imperial Act unquestionably did become operative, it might fairly have been argued that Congress having passed its Act to carry into operation on the part of the United States, amongst other things, article twenty-nine, and Congress having in that Act put a construction upon the said article twenty-nine, Great Britain had adopted that construction when she allowed her statute to become operative. We find, however, that Great Britain excluded article twenty-nine from her statute and that she legislated with regard to those articles only, which by the terms of article thirty-three of the treaty called for legislation. There is therefore no ground for saying that Great Britain has adopted the construction which Congress chose to put upon article twenty-nine, and as one of two contracting parties cannot enter into a written agreement with the other, and then by

a private memorandum of his own either construe or override the written contract, so the United States cannot, without breach of faith, enter into a treaty with Great Britain, and then pass an Act of Congress construing the treaty adversely to Great Britain and contrary to her contention.

A. H. MARSH.

THE LIFE OF A JUDGMENT.

(*Concluded.*)

In our last number we treated only of the right to issue execution upon a judgment. But, as a judgment creates a debt, an action may also be brought upon it, and to this part of the subject the enquiry will now be directed.

We saw in dealing with the earlier practice that if execution were not issued within a year and a day, the plaintiff was driven to his original writ, that is, he was obliged to bring an action on the judgment. His right to do so is limited by the Limitations Act. The statute which has existed for some time is now embodied in chapter 60 of the Revised Statutes, section 1. By that enactment an action upon "a bond or other specialty" shall be commenced within twenty years after the cause of the action arose and not after. By section 8, it is further provided that an action may be maintained within twenty years after an acknowledgment in writing or part payment.

Before the present Real Property Limitation Act, chapter 111, section 23 of the Revised Statutes, there was a conflict, or an apparent conflict between the Act first cited and the Act of which the present chapter 111 is the successor. By the previous Act (R. S. O. 1877, cap. 108, sec. 23) it was enacted that "no action or other proceeding shall be brought to recover out of any land or rent any sum of money secured by any mortgage, judgment or lien, or otherwise charged upon or payable out of such land or rent, or to recover any legacy, but within ten years next after or present right to receive the same accrued to some person capable of giving a discharge for, or release of the same, &c." The introduction of the word "judgment" into this enactment is accounted for by the fact that it is a mere copy of an English Act, and it seems to have been overlooked that

while a judgment may be a charge upon land in England if proper proceedings are taken, it never becomes of itself a charge upon land in Ontario though it forms a foundation for proceedings to realize it out of land. With the statute in that form there was necessarily a distinction to be drawn between it and the Act first cited; for the periods of limitation were different. But in the last issue of the Statute, the revisors, either recognizing that an error had been made in inserting the word "judgment" or for some other reason, omitted the word from the section cited, and thus put an end to a conflict as far as judgments are concerned which might have lasted for an indefinite time. For though our Court of Appeal has construed the two Acts in several cases so as to give effect to both, they seem to have lost faith in their interpretation of them since the decision of late English cases upon a somewhat similar point.

The omission of the word "judgment" from this section brings the Acts into harmony with the decisions upon them which we will now look at.

Caspar v. *Keachie* (*a*) is the first case in which the provisions of the Real Property Limitations Act were applied to a judgment. In that case Wilson, J., held that a writ of revivor to revive a judgment over fifteen years old was a proceeding to recover out of land a sum of money secured by a judgment. It was there said that "a judgment under the section of the Act in question is to be considered as 'charged upon or payable out of land,' as in effect it is when the land of the debtor can be seized and sold under it." This reasoning does not convince. It does not appear to have been urged that by the C. L. P. Act express provision was made for reviving judgments, and this Act with the one in question stood together on the Statute book.

The leading case, in which the effect of the two statutes was discussed is *Allan* v. *McTavish* (*b*). In that case the Court was brought face to face with the question whether the Real Property Limitation Act shortened the period for

(*a*) 41 U. C. R. 599.
(*b*) 2 App. R. 278.

bringing an action on the covenant in a mortgage. In England two statutes had been passed in the same session of Parliament some years before, of a similar import to those in question. After several decisions the law was declared to be finally established by the case of *Hunter* v. *Nockolds* (*c*) that both statutes must be given effect to, and that the one related to the charge upon the land and the other to the personal remedy. This construction rests not upon a single decision, but was adopted by the Court of Queen's Bench (*d*), the Common Pleas (*e*) and the Exchequer (*f*). In Ireland also, Lord St. Leonards, when chancellor, adopted the same view (*g*); and in his Real Property Statutes he says, " The construction is, by reconciling the two provisions to consider the first Act as applicable only to the land, and the later as applicable only to the person" (*h*). In *Allan* v. *McTavish*, the Court of Appeal reviewed all these authorities and decided that our two statutes standing together, a like construction must be placed upon them.

In *Boice* v. *O'Loane* (*i*) the question arose upon a judgment, and it was there expressly determined that the Real Property Limitation Act did not apply to judgments. Moss, C. J. A., points out that it is incorrect to treat judgments as charges upon land, and in that respect over-rules (though without naming the case) *Caspar* v. *Keachie*. He then goes on to say, " Having regard to the ordinary meaning of the language and to the opinions above quoted, the conclusion would seem to be, that if there were no judgments operating as charges upon lands, the section did not affect judgments at all—in other words, that there was no subject matter to which that part of the section was applicable—and that no period of limitation was prescribed for judg-

(*c*) 1 Mac. & G. 640.
(*d*) *Strachan* v. *Thomas*, 12 Ad. & E. 558.
(*e*) *Paget* v. *Foley*, 2 Bing. N. C. 679.
(*f*) *Manning* v. *Phelps*, 10 Ex. 59.
(*g*) *Hughes* v. *Kelly*, 3 Dr. & War. 490.
(*h*) Sug. R. P. Stat. 148.
(*i*) 3 App. R. 167.

ments not forming a charge upon land." This throws us back upon the Act first cited which gives twenty years within which to bring an action on a judgment.

Some doubt has been cast upon these decisions by the decision in *Sutton* v. *Sutton* (*j*). The amendment of the statute to which we have before referred will prevent the question from again arising with respect to a judgment, but as the same question may arise with respect to a mortgage it may be well to call attention to what Lord Justice Cotton said in *Sutton* v. *Sutton*. "One difficulty I have felt has been in consequence of the case of *Hunter* v. *Nockolds*, 1 Mac. & G. 640, decided by Lord Cottenham, in which he expressed an opinion that although in actions brought to recover money issuing out of the land only six years' interest could be allowed, yet he based his decision upon this ground, that one must take the two statutes 3 and 4 Will. 4, c. 27, and 3 and 4 Will. 4, c. 42, together. That might be right under the circumstances. He was driven to that by this consideration that the one Act was only passed three weeks before the other, and therefore he said you must read the two together, and take the latter one only as an explanation of the other Act. I think we are not in any such difficulty here, because the section we have to construe is contained in an Act passed in the year 1874, and therefore there is no necessity for construing this so as to leave the same bar to an action on the covenant as that which is provided by section 42 of the earlier Act. There is no necessity to follow in this case the way in which Lord Cottenham dealt with the two Acts passed almost simultaneously." . As long as our legislation remains as it is, it is presumed that the decision in *Allan* v. *McTavish* has the sanction not only of those authorities which were reviewed when it was decided, but also of the latter decision of *Sutton* v. *Sutton* in which the reason for the distinction is pointed out.

(*j*) L. R. 22 Ch. D. 511.

EDITORIAL REVIEW.

The Quebec Courts Act.

The Act of the Province of Quebec by which a Magistrates' Court was attempted to be erected having been disallowed, a discussion is again raised as to the power to disallow and the effect of an order in Council disallowing an Act.

There is no doubt that the power of the Queen-in-Council to disallow a Dominion Act, and that of the Governor-General-in-Council to disallow a Provincial Act are unfettered and unlimited by anything but the advice of responsible ministers. The power to disallow Dominion Acts is given by section 56 of the British North America Act, and the power to disallow Provincial Acts by the 90th section. In each case the power is, as we have said, unlimited and unfettered save by the advice of ministers. It is therefore possible in any case for the superior power to disallow any Act without assigning a reason therefor. Reasons have heretofore been assigned for the disallowance of Provincial Acts; but neither the assigning of reasons nor the apparent limitation of the veto power by a restrictive reason can modify or limit the power of disallowance. If it were otherwise the creating power could be limited by the created being, and would thus be subject to instead of superior to it. It is quite a mistake to suppose that the power to disallow Acts was vested in the Dominion for the purpose of keeping the Provinces within their topical jurisdiction. An Act which is *ultra vires* does not require disallowance. It is void *ab initio*. It is those Acts which would be enforceable as being *intra vires*, that require to be disallowed if it is deemed advisable that they should not come into operation. It has been alleged as a reason for disallowance in some cases that the Act disallowed was *ultra vires*. But disallowance is only a convenient mode of getting rid of an Act of doubtful validity.

The question of Courts and Judges is a sore one between the Dominion and the Provinces. For years the Bar of Ontario have been endeavouring to persuade the Dominion Government to pay decent salaries to the Judges, without success, and it is said that in Quebec the number of Judges is entirely inadequate. While we are inclined to think that the difficulty in Quebec is due to some extent to the system, which is diffuse while ours is concentrated, we are quite ready to defer to local opinion which is more apt to be correct than our own. Owing to the peculiar system by which the Provinces erect the Courts and the Dominion provides the Judges, it is a matter of vast importance to see that any legislation on the subject is *intra vires*. It was pointed out in one case that though the administration of justice was by the British North America Act intrusted to the Provinces including the constitution, maintenance and organization of Provincial Courts, the Dominion had practically the ultimate control of the administration of justice; for, although the Provinces might constitute Courts, the Dominion might refuse to provide the Judges; and under section 101 it is declared that, "The Parliament of Canada may, notwithstanding anything in this Act, from time to time, provide for the constitution, maintenance and organization of a general Court of Appeal for Canada, and for the establishment of any additional Courts for the better administration of the laws of Canada." It was argued before the Judicial Committee that the expression laws of Canada" used in this section meant Statutes passed by the Dominion Parliament: 3 C. L. T. 343. But this view was not entertained, and the expression must therefore be extended to all laws in force in Canada whether they originated at Common Law or in Acts of the Imperial or Canadian Parliaments or the Legislatures of the Provinces, old or new. It is evident then, that the ultimate controlling power over the administration of justice resides in the Dominion. Furthermore, the framers of the Act looked forward to the possibility of assimilating the laws of three of the Provinces, and provision was made for this by the 94th section. That such a consummation is devoutly to be

wished appears from the 20th resolution of the delegates to the recent Quebec conference, 7 C. L. T. 296; and the experience of all business men also bears testimony to its advisability. After such a provision for uniformity has been made section 96 of the British North America Act provides that the Dominion Parliament may thereafter make laws respecting the subjects which are reduced to uniformity.

The residue of power was therefore not idly placed in the Dominion Parliament. It was but the part of a design for consolidation of the Provinces of which the British North America Act was the first step.

It is, then, not only a matter of vast intrinsic importance that the powers respecting the erection and constitution of the courts should be properly exercised, but one of vital consequence to the Dominion and to the whole scheme of Confederation. The further away from complete consolidation we get the greater difficulty will there be in retracing our steps; for what was only permissible at first will in the end be construed as a right.

If the grievance of a want of Judges is a sound one the Province of Quebec is entitled to the greatest sympathy. We can easily imagine the difficulty that would be experienced in getting any co-operation in remedying it. Whether or not the Provincial Legislature has adopted the proper course by passing the Act in question is very problematical. The validity of the Act is we believe to be tested apart from the question of disallowance, and as to that we await the decision of the Courts. But there seems to be a very easy solution of the question in another way. Granted the validity of the existing Courts, and also the lack of Judges. By simply passing an Act increasing the number of Judges the *onus* would be cast upon the Dominion to appoint them. That course was adopted in Ontario and no difficulty was experienced.

On the other hand, it may be a curious question whether the Provinces may not if they please increase the jurisdiction of inferior Courts to an unlimited extent, and then by appointing justices and other magistrates to exercise

the increased jurisdiction secure control of the appointments. As the authorities at present stand the power to appoint justices resides with the Provinces, and there seems to be no limitation of the power of the Provinces to give them jurisdiction. That is a point which will probably arise in the test case.

To return to the question of disallowance. Once an Act is disallowed a curious situation is the result. The Act says that "such allowance being signified by the Lieutenant Governor, by speech or message to the Legislature or by Proclamation, shall annul the Act from and after the day of such signification." The Act contemplates obedience to the certificate of disallowance. But if the Lieutenant Governor is advised by his ministers not to issue the proclamation, a conflict immediately arises between the Lieutenant Governor as a Dominion officer owing obedience to the Dominion, and the Lieutenant Governor as a Provincial administrator who acts upon the advice of responsible ministers. From a legal aspect there is no reasonable doubt as to which course he must pursue. He must obey the law, and the law is not made by his ministers. It never was intended that the body which passed the offending law, or any branch of it, should have the ultimate right to say whether it should be enforced or not.

In the meantime between the assent to the Act and the disallowance there is an interval in which the Act is unquestionably valid, and this is evidently a grave defect in the constitution of the right to disallow.

Forfeiture of Lease and the Conveyancing Act.

An interesting case is reported in L. R. 21 Q. B. D. at page 289, upon the construction of a section of the English Conveyancing Act to which our Statute R. S. O. cap. 143, sec. 11, corresponds. *Swain* v. *Ayres* is the case. It appeared that the defendants were in possession under an agreement for a lease which provided for the making of certain improvements and repairs, upon which a lease was

to be granted to contain all usual covenants, and particularly covenants to pay rent and keep the premises in good repair, together with a condition for re-entry for breach of any of such covenants. The stipulated repairs and improvements had been made, but no rent had been paid, and no lease had ever been executed. The premises were not kept in repair by the defendants, and this action was brought to recover possession for breach of the agreement to repair. No notice was given under the section of the Act in question specifying the particular breach complained of and requiring the defendants to remedy it.

It was held by the Court of Appeal, affirming the judgment of Charles, J., that there was no lease within the meaning of the Act, and therefore that the defendants were not entitled to the notice. It was argued, that there was a lease in Equity, that is, that Equity would consider that a lease existed if the agreement therefor was proven. As to this, Lord Esher said, "The distinction between law and equity is now abolished in the sense that the same Court is to give effect to both, and that, where the doctrines of law and equity conflict, the latter are to prevail. I should therefore be disposed to say that, where there is such a state of things that a Court of Equity would compel specific performance of an agreement for a lease by the execution of a lease, both in the Equity and Common Law Divisions the case ought to be treated as if such a lease had been granted and was actually in existence. There would then be the equivalent of a lease, that is to say, the lease of which equity would compel the execution in specific performance of the agreement. That is a very different thing from saying that, where equity would not compel specific performance by the execution of a lease, the lease of which equity would not decree execution is to be considered in equity as existing. That contention seems to me quite untenable. It seems to me quite impossible to say that equity would consider a lease in existence, though it would not grant specific performance by decreeing execution of a lease. Such a contention seems to me to make the course of equity on the subject self contradictory."

Lord Justice Lindley said, "It was argued with some ingenuity that, though in such cases there is not a lease in law, there is a lease in equity. That seems to be playing with words. There is not in fact a lease." But while the Court so decided, there is just enough encouragement in what was said to induce one to try the question whether "the equivalent of a lease" is a lease within the meaning of the Act. A strict reading of the Act will make it apply only to a lease in fact, an actual lease in tangible existence, and from the phraseology of the section there is no doubt that that was the intention of the framers of the Act. But by construction there is the equivalent of a lease which is spoken of, that is the lease which equity would decree to be executed if it found the lessee entitled thereto. If such a state of circumstances is within the Act the lessor in every case will have to play with something more difficult to handle than words. Lord Justice Lindley's dictum, "There is not in a fact a lease," will do him no good, for he will have to determine whether there is the equitable equivalent of a lease. That may be very difficult to determine, and as a matter of prudence the lessor may be driven to give the notice required by the Act, and then run the risk of being told that he must have considered the lessee entitled to specific performance and to a formal lease, otherwise he would not have given the notice.

REVIEW OF EXCHANGES.

American Law Review.—January-February, 1888.

The Common Law as a System of Reasoning—How and why essential to good Government; What its perils, and how averted, by JOEL PRENTISS BISHOP. A defence of the system of the common law against the codifiers. The learned writer likens the work of the codifier to him who would embody in a rule the proposition that the square of the hypotenuse of a right angled triangle is equal to the sum of the squares of the other sides, without disclosing the process of reasoning which leads to proof. The real difficulty in codification is to invent a terminology that will defy criticism; and this the learned writer points out, saying: "If your jurist is able to express himself in a way to avoid questions of interpretation,—a feat never yet accomplished in any legislation,—so that all will understand him to mean what the common law did, I will consent to the proposition that judicial things will go on much as they did before."

A Century of American Law, by JOHN F. DILLON. A review of the growth of law in the past century.

Improvements in the Law, by DAVID DUDLEY FIELD. A plea for codification.

Text and Citations, by JAMES SCHOULER. Some remarks upon bookmaking.

Delegation of Powers and Trusts, by A. H. MARSH. Concluded from the previous number. When the act to be done is merely ministerial, then the trustee may delegate his power, but he cannot delegate the confidence and discretion reposed in him. But a discretionary power coupled with an interest limited to A. and his assigns and annexed to an estate is exercisable by the grantee or his assigns. A trustee may delegate certain duties in cases of legal necessity, and of moral necessity arising in the usual course of business. He may also adopt an agent's act, as when an arbitrator chose to adopt the valuation of another person. Cases are cited showing how a power may be annexed to a fee simple and be exercisable by the holder of the estate.

Adulteration of Food, by ALBERT B. GUILBERT. It was an indictable offence at common law to mix unwholesome ingredients in anything supplied for the food of man. Under the police power of a State regulations for the health of the citizens may be made and are constitutional. Sundry acts and authorities are cited.

"Dying without issue" construed in Devises of Real Estate, by SIMON G. CROSWELL. A few English and American cases are cited.

THE

CANADIAN LAW TIMES.

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ALTERATION OF JUDGMENTS, SENTENCES AND VERDICTS.

I. *Criminal proceedings.*
  1. *Verdicts.*
  2. *Sentences.*
    (i) *No sentence.*
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II. *Civil proceedings.*
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THE alteration of judgments and verdicts falls to some extent within the branch of law or practice which relates to amendments at the present time. Such large powers of amendment have been given to the Courts that even upon an appeal the Court may itself adjust the record so as to make it answer the evidence which has been adduced at the trial. The rights of the parties with respect to the subject matters of the action are thus dealt with in exact accordance with the truth of the facts as appearing in the evidence, while the only penalty which the suitor has to pay for having wrongly constructed his

record is an indemnification of the party wronged thereby with respect to costs.

With such latitude in the matter of amendment, we are not surprised to find the rules of the Court exceedingly elastic in adjusting the rights of parties. There must, however, be finality in litigation; there must be a period at which the rights of the parties, as adjudicated upon by the Courts, are finally set at rest, whether rightly or wrongly found by the Court, in obedience to the maxim *interest reipublicæ ut sit finis litium.* This finality will appear at several stages during the progress of an action; for instance, it is necessary to accord finality to interlocutory process, for the parties would never arrive at a trial of the case if there were no finality in intermediate steps. It is necessary to accord finality to the judgment of first instance; and where there is an appeal it is necessary to accord finality to the adjudication upon the appeal; and, so, at every step where there is an adjudication which is evidenced by some formal document in which is embodied the sentence of the Court, it is absolutely necessary to attribute finality to this document in order that there may be an end of litigation. That is to say, with respect to intermediate judgments (which term we must apply to those judgments which are pronounced between the inception of the litigation and the judgment of the last Court of Appeal), the finality is of this nature, that the Court which pronounces a judgment cannot pronounce a contrary or other judgment after the judgment itself has been formally drawn up and entered. It is final in this respect, and it is further final in another respect; that is to say, if the judgment, though alleged to be wrong, has not been appealed from within a certain time, which time is fixed by rules of Court in all systems of procedure.

The absolute quality of finality applies only to a judgment of the highest Court in the realm, because that Court absolutely fixes the law as applied to the particular case before it, and it can be altered only by Act of Parliament.

We propose to deal more particularly with that portion of the subject which applies to the power of the Courts over their own judgments, and does not fall strictly within the principle upon which amendments are made, but depends upon principles of its own; and we will incidentally touch upon the qualities of a final judgment of the Court of last resort. The division of the subject which we have placed at the head of this article seems to be the most convenient for the discussion of the subject.

I.—*Criminal Proceedings.*

The formal entry or drawing up of a judgment in criminal proceedings differs essentially from that in civil proceedings. It has been said that a man cannot recover the smallest sum of money without the formality of writ, pleadings, trial before a Court of Justice, entry of a formal judgment, and the issue of regular process in execution of that judgment; but a man may suffer the highest sentence which the law can pronounce—that of death—with no greater formality in the record and execution of the judgment than the drawing up of a schedule containing his name, his offence, and the abbreviated term *sus. per coll.* signed by the Judge (*a*). To the difference in the formality with respect to recording judgment and executing will be attributable probably some difference between the power of a Court exercising criminal jurisdiction to alter its judgment and that of a Court of civil jurisdiction to do the same. We propose, therefore, to illustrate by examples how the power has been exercised by Courts of criminal jurisdiction in dealing with verdicts and sentences, the sentence in criminal proceedings being equivalent to the judgment in civil proceedings.

1. *Verdicts.*

In *Rex* v. *Parkin* (*aa*), it was held that if a verdict was entered upon the record which appeared not to be

(*a*) 4 Bl. Comm. 503, 404.
(*aa*) 1 Moody C. C. 45.

according to the intention of the jury, it might be corrected, if that were done with promptness. In that case the jury had not left the box; but the decision of the case merely states that it may be done promptly, without mentioning any particular period of the time during which this jurisdiction may be exercised.

In *Rex* v. *Suffolk* (*b*), the defendant was indicted for poisoning horses. It appeared that the horses of the prosecutor had been ailing, and the defendant, who was in charge of them, gave them some weed which he believed would cure the ailment, but of whose properties he must have been ignorant. The result was that the horses died of poisoning which was the immediate result of administering the noxious weed. The defence was that the defendant did not know the character of the weed, and that he did not intend to poison the horses. The jury returned a verdict of "Guilty by Mischance." The Judge refused to receive the verdict and told them that if they did not believe the man intended to kill the horses, they might return a verdict of "Not Guilty." They then returned a verdict of "Guilty, with a Recommendation to Mercy;" and, on being asked, explained why they recommended him to mercy. The first verdict, which had been entered on the record, was then altered, and the Court refused a mandamus to the Sessions to cancel the alterations and restore the former verdict, holding that before the jury had left the box they might make any correction in order that the proper verdict might be entered.

In *Regina* v. *Vodden* (*c*), the jury entered the box after consideration of their verdict, and the foreman said "Not Guilty." The Chairman of the Sessions and the Clerk of the Peace both entered the verdict, and the prisoner left the dock. One of the jury then rose up and stated that the verdict was "Guilty;" and thereupon the prisoner was brought back and the proper verdict given. A case was

(*b*) 1 H. & W. 313; see also *Regina* v. *Meany*, 9 Cox C. C. 231.

(*c*) 6 Cox C. C. 226. But see *Marianski* v. *Cairns*, 1 Macq. H. L. 212, 766.

reserved, and the Court was unanimous in holding that it was proper to correct the mistake.

In *Regina* v. *Virrier* (*d*), it was held that a verdict might be amended from the notes of the Judge, or from any other document; but should not be amended from the recollection of the Judge alone.

The subject is not of great importance at the present day except in connection with criminal proceedings, because the Court in civil proceedings has now such large powers of doing justice between the parties on the evidence, that the verdict of the jury, except in some cases which are peculiarly adapted to that mode of trial, is not treated with with as much respect as it formerly was.

2.—*Sentences.*

This branch of the subject may be divided into

(i) Cases where there has been no sentence by the convicting court, which will include cases in which the sentence is a nullity.

(ii) Cases in which a wrong sentence has been pronounced.

(iii) Cases in which the right sentence has been pronounced, and an alteration has been made.

(i) *No Sentence.*

First, as to cases in which no sentence has been pronounced.

In *Rex* v. *Kenworthy* (*e*) the defendant was tried at the Assizes for perjury, and was found guilty. The record showed that the Judge, in pronouncing sentence at the Assizes, *ordered* him to be transported. There was a discussion in the Court above as to the construction of the Act under which he was sentenced, and the Court held that the punishment awarded was not the correct punishment, according to their construction of the Act; and the question therefore arose whether they could pronounce sentence upon him. Abbott, C.J., said, "By the Act in ques-

(*d*) 12 A. & E. 317.
(*e*) 1 B. & C. 711.

tion two things are required to be done by the Court before which the party is tried; an order for transportation is to be made, and thereupon judgment is to be given. Now, here the Court made an order not followed up by a judgment. There is no doubt that at Common Law, where the punishment is not discretionary, the record of an inferior Court may be removed into this Court, and we may pronounce judgment; but in this instance we cannot do so. Inasmuch therefore as no judgment has been entered below, and this Court has no power to supply the deficiency, the proper course appears to be for us now to order the Court below to proceed to give judgment on the conviction."

It will be observed in this case that, although sentence had actually been pronounced, the record merely used the word "ordered" instead of "considered," which was the technical term to be used in entering the judgment on the record. This left the Court to construe the record as merely containing the order which the Court below was bound to make under the statute, and to hold that the judgment which the statute also spoke of had never, in fact, been pronounced. There was, therefore, no sentence of record, and the Court, not having power to pronounce the sentence itself, remanded the prisoner and directed the proper sentence to be pronounced at the next Assizes.

In *Sir Walter Raleigh's case* (*f*) it appears from the report that, being attainted of treason before commissioners in the first year of James I., he was committed to the tower, and there remained imprisoned for three years. He was then permitted to go at large. Yelverton, the King's attorney, made a motion to the King's Bench for execution upon the judgment of the commissioners, and said, "that he had since committed offences which were just cause of proceeding against him, but he being a prisoner and dead in law, there could not be any proceedings for these new offences, but to take execution on the former judgment,

(*f*) Cro. Jac. 495.

which he prayed might be done." Sentence was accordingly pronounced and executed.

So in *Rex* v. *Athoe* (*g*), the King's Bench, after determining a point as to the jurisdiction of the justice of assize who tried the prisoner, sentenced him to death. And where R.C. (*h*) being attainted of felony for horse stealing, was brought before the King's Bench by *habeas corpus*, and the record removed by *certiorari*, sentence was passed upon him and subsequently executed. *Rex* v. *Dale* (*i*) may also be consulted for a similar point and a collection of the cases on the subject; and in *Rex* v. *Royce* (*j*) and *Rex* v. *Taylor* (*k*) special verdicts were brought up and sentence pronounced thereon and executed.

From these cases we may also deduce the rule that no fixed period of time must be observed between the verdict and the sentence, and so it was determined in *Regina* v. *Vodden* (*l*).

(ii) *Wrong Sentence.*

Secondly, as to wrong sentences. At Common Law if the wrong sentence had been pronounced, the Court above could not pronounce the proper sentence.

In *Rex* v. *Bourne* (*m*), the defendant's counsel with a good deal of temerity moved in the Court of King's Bench to quash the judgment passed in the Court below, on the ground that the proper sentence for his client's offence was hanging and not transportation for seven years, which had been pronounced against him. The Court there said: "Here the Court below has passed a judgment, and that judgment being erroneous, we think there is no ground for sending it back to be amended; the consequence is that the judgment pronounced by the Court below must be reversed." The Court followed a case of *Rex* v. *Ellis* (*n*), by which they said they were bound. In this case the sentence was fourteen years' transportation instead of

(*g*) 1 Str. 553.
(*h*) Cro. Car. 175.
(*i*) 2 Show. 511.
(*j*) 4 Burr. 2073.
(*k*) 5 Burr. 2793.
(*l*) Supra.
(*m*) 7 A. & E. 58.
(*n*) 3 Q. B. 406.

seven, which was wrong; and it is distinguised from *Rex* v. *Kenworthy*, in which there was no sentence.

This case was followed again by *Reg.* v. *Silversides* (*o*), though the law was doubted by Lord Campbell in *Halloway* v. *Reginam* (*p*), a case decided after the statute referred to below. His Lordship there said: "It was indeed held in *Rex* v. *Bourne* that the Court of Error could not give judgment on a valid count even where there was but one sentence which could be passed. I, as Attorney-General, conducted that case on the part of the Crown, and bowed to the decision of the Court; though I doubted its correctness, and my opinion was strengthened by the doubt of my brother Patteson, who will always be to me an oracle of the law. In that case, I should have directed further proceedings in error, but the prisoners had been discharged. It was always my opinion that where the sentence was discretionary, the Court of Error could not well pronounce the judgment, and the Court below should; but that, if only one judgment could be given, the Court above might safely pass the sentence which ought to have been passed by the Court below."

This manifestly unjust state of the law has been amended by R. S. C. cap. 174, sec. 267, which clause has been continued from an early date. It is as follows:— "Whenever in a criminal case a writ of error has been brought upon any judgment or any indictment, information, presentment or inquisition, and the Court of Error reverses the judgment, the Court of Error may either pronounce the proper judgment, or remit the record to the Court below in order that such Court may pronounce the proper judgment upon such indictment, information, presentment or inquisition." There are several cases which has been decided under this statute.

In *Regina* v. *Sherman* (*q*), on a motion for a rule to arrest judgment and discharge the prisoner, the Court held that they had power to pass the proper judgment if

(*o*) 5 B. & C. 395.
(*p*) 17 Q. B. at p. 327.
(*q*) 17 C. P. 166.

a wrong one had been given. The prisoner was charged with an offence under the Mutiny Act. There was also a Provincial Statute, and a question arose as to which was in force, the punishment under each being different. The Court was divided and the rule dropped. But it was said that the Court could have pronounced the proper sentence if a wrong one had been pronounced.

In *Cornwall* v. *Reginam* (*r*), the facts were that the defendant was indicted for kidnapping. One count of the indictment was held bad in not averring an intent to unlawfully confine the person intended to be kidnapped within the country. The second count was good, and alleged kidnapping with intent to take the person out of the country. A general verdict of "guilty" was entered, and on a writ of error it was held that judgment pronounced generally was wrong. The Court said: "The judgment must therefore be reversed, and, as we cannot pronounce judgment because the punishment is discretionary, and we have no knowledge of the facts, we must remit the record to the Judge who tried the prisoner and gave judgment, in order that he may pronounce the proper judgment upon the record against the prisoner. And for this purpose we order that a writ of *habeas corpus* do issue to the warden of the penitentiary to deliver the body of the prisoner to the sheriff of the county of Middlesex, and a writ of *habeas corpus* to the sheriff of the county of Middlesex to receive the body of the prisoner from the said warden, and the prisoner safely to convey to the common gaol of the said county of Middlesex, and him cause to be detained therein in safe custody till William Elliott, Esq., Judge of the County Court of the said county, and authorized to act as chairman of the General Sessions of the Peace in and for the said county, by and before whom the said prisoner was tried and sentenced, shall pronounce the proper judgment on the record, which record we direct to be remitted to him for that purpose according to the statute in that behalf."

The Judge would, of course, pronounce his judgment

(*r*) 33 U. C. R. 106.

only upon the second and valid count or charge contained in the record, the effect of which would be the same as if it had been originally pronounced upon that count alone.

Where the judgment is not discretionary, but is fixed by law, the Court in such a case would probably pronounce the judgment which should have been pronounced without remitting the prisoner to the Court below. Power to do this is given by the Statute, and moreover the Court, as we have seen, has inherent power to sentence the prisoner tried in an inferior Court where the punishment is not discretionary.

It has been said that where the punishment is discretionary and the Judge has pronounced sentence, the sentence then is in the same position as if it had been fixed originally by Statute. One would imagine, then, that where there is an informality in entering the judgment, or some other informality, the Court above could, upon writ of error, readjust the record by entering in a formal manner the same judgment which the Judge below had pronounced, it being in fact the appropriate sentence for the offence, though informally given, but the above cases show that the Courts are not inclined to follow such a rule. In reading *Halloway* v. *Reginam* (*s*), which the cases above cited follow, we might almost infer from what Lord Campbell, C.J., said that what we have suggested would be the correct course to adopt. He said, "On the construction of 11 and 12 Vict. cap. 78, sec. 5, I have no doubt that, if there should be one good count, and the rest bad, we should be bound either to give judgment on the good count, or remit the case to the Court below for them to pass such judgment. * * Now, however, it is expressly provided by the late Act that if judgment is reversed the Court of error may either pronounce the proper judgment, or remit the record to the Court below, in order that they may do so. And, where the indictment has good and bad counts, so that the Court below ought to have arrested judgment on some and sentenced on others, but they have sentenced on all, the court of error is no longer under difficulty, but may itself arrest judgment on

(*s*) 17 Q. B. 327.

the bad counts and sentence on the good. It is suggested that this takes place only where a sentence which has been pronounced is the wrong one; but I think the rule applies where the judgment has been improper, or where it proceeds upon several counts and one is defective; and if we find a good count in the present instance, I do not see any difficulty in our either sentencing upon it or remitting the record for that purpose to the sessions."

(iii) *Alteration of Sentence.*

Thirdly, as to alteration of sentences. We now come to a class of cases in which the power of the Court to review its own judgment before it has been formally entered, and even in some cases, after it has actually been entered, is discussed.

In *Regina* v. *Fitzgerald* (*t*) the report runs as follows :— "The defendant being convicted of a scandalous libel, judgment was given against him to pay 100 marks fine, and to go to all the Courts in Westminster with a paper in his hat. In chancery he behaved himself impudently and justified his offence, for which reasons the Court increased his punishment by imprisonment." It is possible that at this day this report might be construed into a report of a judgment of imprisonment for contempt of the Court of Chancery for behaving impudently; but the report does not state that it was the Court of Chancery which punished him, and there are other cases which go to show that power of the Court to alter its own sentence existed (*tt*).

In *Rex* v. *Price* (*u*), a rule for a new trial was discharged in term. During the same term the defendants were brought up for judgment, and sentence was passed on them to be imprisoned in Newgate for one month and then transported for seven years. The Court afterwards, in the same term, were of opinion that a different punishment should

(*t*) Salk. 401.

(*tt*) For instances in which the Courts have punished misbehaviour in the face of the Court, either by persons in attendance, or by convicted prisoners, see *Davis' Case*, Dyer, 188, pl. 10, and notes thereto.

(*u*) 8 East, at p. 328. See to the same effect *Regina* v. *Fitzgerald*, 20 U. C. R, 546, where it was held that the sessions could grant a new trial during the same session.

have been inflicted, and directed the defendants to be brought up again on the last day of term for the purpose of having a different judgment passed on them. "Grose, J., calling to the prisoners, and stating that the Court had vacated the sentence pronounced upon them on Saturday last in this term, proceeded to pass sentence, that each of them for his offence should lose and forfeit £20, and be imprisoned in Newgate by the space of six months without bail or mainprize, and that his oath, etc." Lord Ellenborough said this might be done at any time within the same term.

In *St. Andrew's Holborn* v. *St. Clement's Dane* (*v*), there is a very plain statement of the power of the Courts with respect to this. There was a *certiorari* to the Sessions to send up certain orders made by them, and upon return of the *certiorari* they sent up (1) an order, reciting an appeal with respect to the removal of a pauper, and that the respondents did not appear, and therefore that the appeal was allowed; (2) an order reciting the payment of 40 shillings costs payable to the appellants by the respondents for not appearing (which sum was paid), and vacating the order first made, and directing the appeal to be heard; (3) an order dismissing the appeal. Darnell moved to quash the second and third orders because the hands of the Court were tied by the first order; "*Sed tota curia contra*," and Holt, C.J., said that, "During the Sessions the order was in the breast of the Court, and though it was drawn up, yet it was so far in the breast and power of the Court that by the second order it ceased to be a record. The Court at the Old Bailey have altered and set aside their judgments ten times the same Sessions; where judgment *de pain fort et dure* has been given the Court have after let him in to plead, and after upon his trial he has been convicted and has had another judgment against him, to be hanged. So it is of judgments here, which during the same term are in the breasts of the Judges; and then he said they ought to set the first order wholly aside and have entered up the third order as the only order; for the effect of the Court's

(*v*) Salk. 606.

setting aside of the first order is that it ceases to be an order, and consequently ought not to be returned to us as an order vacated by another order; but it should have been annulled and made nothing. As in this Court we cannot enter up one judgment upon record, and then enter a vacat of that, and then enter a contrary one. The Sessions as well as the Term is but one day in law."

Similar cases in principle are those cases in the Sessions which are reported upon a similar point; though not with as much particularity in expression of the law generally as we find it in the report in Salkeld.

In *Regina* v. *The Justices of Leicestershire* (*w*), in an appeal against an order of removal, the Justices were equally divided, and judgment was entered for quashing the appeal. On a rule for a mandamus to re-hear, it was held that the Justices might have altered their judgment at any time during the Session. Lord Ellenborough said, "If any error was made in the entry of the Clerk of the Peace, that error should have been pointed out at the Sessions while the Court was sitting and competent to reform its own errors, and to draw up a more correct judgment. If this application were entertained, the consequence would be that the Court would have on all occasions to look, not to the record alone, but to extraneous matter in order to see how the judgment of the Justices at Sessions was obtained. The Court will not do this. * * * * * * If no judgment had been pronounced, the Court might have interposed; but here there is a judgment."

In *Regina* v. *Fladbury* (*x*), there was an appeal on an order for removal. There was an equal vote of the Justices, and the chairman gave a casting vote, which he had no right to do. The next day the matter was again argued before the Justices, and there being a different quorum present, they determined "to adhere to" the former decision. On a case reserved it was held that the Court above would not assume that the proceedings on the second day were not on the merits. This is equivalent to

(*w*) 1 M. & S. 442.
(*x*) 10 A. & E. 706.

that holding a re-hearing and contrary decision was within the power of the Justices.

In *Rex.* v. *Fletcher* (*y*), there was an informality in pronouncing sentence of death, inasmuch as no disposition had been made of the body of the prisoner by the sentence. The Judge signed the calendar with the proper sentence entered, which did include the disposition of the body of the prisoner. A case was reserved for the Court, and the Judges were equally divided as to whether this was an integral part of the sentence, or whether the statute was merely directory as to the disposal of the body of the prisoner. The report says, "All the Judges agreed that the omission in the passing of the sentence might have been remedied by the Judge going again into Court after adjournment from the lodgings and ordering the prisoner to be again brought up, and then passing the proper judgment; as the sentence may be corrected or altered at any time during the Assizes."

It will be observed from the method in which the Courts disposed of these cases, that the Court which pronounces the sentence has very extensive power with respect to altering the judgment. In delivering judgment, the Courts above have repeatedly referred to the sentence being within the breast of the Court, not only before it has actually been entered or drawn up, but even after the formal entry on the record, if it be done during the same sittings or sessions of the Court.

Chief Justice Holt, in *St. Andrew's Holborn* v. *St. Clement's Dane*, remarked that the first order of the Sessions which had been entered should have been entirely abrogated and annulled and not returned as an order because the third order took its place. And the Court above must therefore apparently deal only with the record which is returned to it by the Court below. It is possible, therefore, for the inferior Court, or the Court of the first instance, to have its record so adjusted that when it is sent to a higher Court for review, no fault can be found with it.

(*y*) R. & R. 58.

At p. 448 of the *Law Times*, vol. 42, there is a report of an incident which took place at a Court of Assize in England in 1867. Two burglars had been condemned to imprisonment, and thereupon, while in the dock, fell on the gaolers and would have murdered them if a number of police had not interfered. They were finally overpowered by six or eight men. The Judge ordered them to be again placed at the bar, and increased their sentences. "In doing so," the report proceeds, "he observed that he had thought the sentences he had originally imposed might have sufficed; but from what had occurred it was shown that they were hardened, incorrigible offenders, and therefore their sentences were increased." The opinion is expressed at pp. 241 and 439 of the same volume that the proceeding was perfectly regular, and some of the cases to which we have referred are cited.

There is another class of cases of great importance which may be grouped together, and properly fall under this heading. They are cases in which the sentence has been altered but not in the sense in which we have thus far spoken of the matter. They are cases in which the day for execution has passed, and the sentence for that or some other reason was not executed, but execution has been subsequently directed by the Court notwithstanding.

In *Rex* v. *Garside* (*z*) the prisoners were convicted of murder and sentenced to be executed, but a question arose as to what sheriff should execute the sentence, and the prisoners were from time to time respited. The Attorney General now moved for a *certiorari* to remove the record, and a *habeas corpus* to bring up the prisoners that execution in accordance with the sentence might be awarded. The Court of Queen's Bench granted the writs, and when the prisoners were brought before it directed the sentence to be executed in pursuance of the judgment.

In *Middleton's Case* (*a*) the defendant was condemned for a robbery, and escaped. Being taken again and con-

(*z*) 2 A. & E. 266.
(*a*) Poph. 131.

fessing his identity the Court awarded execution, saying that it was no new case. The report does not state whether or not the time for execution of the judgment had gone by, but it is presumed that it must have.

In *Rex* v. *Ratcliffe* (*b*) the defendant was atainted of high treason in 1716. While under sentence of death he escaped to France, but was captured on a French ship off the coast in 1745. In 1746 he was brought before the King's Bench for sentence, and after the trial of an issue as to his identity sentence of death was pronounced and executed.

In *Earl Ferrers' Case* (*c*) the House of Peers asked the following question (amongst others) of the Judges:— "Supposing a peer so indicted and convicted ought by law to receive such judgment as aforesaid [death] and the day appointed by the judgment for execution should lapse before such execution done, whether a new time may be appointed for the execution, and by whom?" The answer was, "Supposing the day appointed by the judgment for execution should lapse before such execution done (which however the law will not presume) we are all of opinion that a new time may be appointed for the execution, either by the High Court of Parliament, before which such peer shall have been attainted, or by the Court of King's Bench, the Parliament not then sitting; the record of the attainder being properly removed into that Court."

In *Regina* v. *Young*, in the Queen's Bench of Ontario, T. T. 40 Vict., a case which, strange to say, has never been reported, the prisoners were sentenced to be hanged on the 21st June, 1876, but having escaped and not being retaken till after the day for execution had passed, were brought before the Court on *habeas corpus* in Trinity Term and again sentenced to be executed on 22nd September, 1876.

As to the method of removing a record from the Assizes since the Judicature Act, see *Regina* v. *Bunting* (*d*).

(*To be Concluded.*)

(*b*) Fost. C. C. 40. (*c*) Fost. C. C. 139. (*d*) 7 Ont. R. 118.

EDITORIAL REVIEW.

Railways Under the Constitution.

Those portions of the Railway Act which specially refer to the crossing of a Railway under the legislative control of the Parliament of Canada, and which are perplexing the sister Province of Manitoba, raise one of the most important constitutional questions that has arisen in Canada since Confederation. The question that arises is a purely legal one, and though the legislation is by no means new to lawyers, the particular point in question has not heretofore become prominent.

The legislation in question arose out of actual necessities in the government and control of railways, and its history is easily traceable.

As long ago as 1877, by the Act of the Parliament of Canada, 40 Vict. cap. 45, it was enacted that sub-sections 15 and 16 of section 7 of *The Railway Act, 1868*, should extend to railways incorporated under Provincial Acts, in any case in which it was proposed that such railways should cross, intersect, join or unite with, or should be crossed, intersected, joined by, or united with Dominion railways. The sections applied declare in effect that a railway company has power "to cross, intersect, join and unite the railway with any other railway at any point on its route, and upon the lands of such other railway, with the necessary conveniences for the purposes of such connection; and the owners of both railways may unite in forming such intersection, and grant the facilities therefor; but in case of disagreement upon the amount of compensation to be made therefor, or upon the point or manner of such crossing and connection, the same shall be determined by arbitrators to be appointed by a judge of one of the Superior Courts in the Province in which the point of

junction or intersection is situated." The 16th sub-section declares that no railway company shall avail itself of any of the foregoing powers without application to the Railway Committee for approval of the mode of crossing, notice of which is to be given to the other company, and when such approval has been obtained, either railway company, in case of disagreement as to the amount of compensation, may proceed to arbitration as before provided. In 1877, as we have seen, these sub-sections were made applicable to Provincial railways, and ever since that time they have had the absolute statutory right to cross, intersect, join and unite with Dominion railways at any point on their route, subject only to approval by the Railway Committee of the mode of crossing, the point of crossing, and the amount of compensation to be paid therefor. (See 51 Vict. cap. 29, sec. 173). The committee would not have the right to refuse to allow the crossing in some form or other, at some point or other, and though they might harass and annoy a local company by refusing to adopt a reasonable mode and place of crossing, such a proceeding would expose them to public indignation, if indeed they would not be subject to proceedings by mandamus to compel them to obey the statute, and accord the right: see *Re Massey Manufacturing Co.*, 11 Ont. R. 444; 13 App. R. 446.

Given the right to Provincial Railways to cross those under the legislative control of Canada, and the result is a conflict of laws which is unquestionably against the public interest.

Where the Provincial Railways do not come into contact with a Dominion Railway there can be no conflict between the laws governing them. But when a Provincial Railway is either worked in connection with a Dominion Railway or comes into physical contact with it, it is very easy to see how complications might arise. For instance, the Dominion Railway Act requires a train to stop for one minute before crossing the track of another railway on a level. The Ontario Railway Act requires a stoppage of three minutes under similar circumstances. Which is to

be obeyed? The complication becomes greater if the time prescribed by the Provincial Act is shorter than that required by the Dominion Act. Many other complications might easily arise, due simply to the conflicting laws, which would be exceedingly detrimental to the public interest.

The evident necessity for bringing under the same jurisdiction those railways which were in contact with each other produced the legislation which we find in 46 Vict. cap. 24 sec. 6. It is as follows:—"Whereas it is, in and by the '*The British North America Act*, 1887,' among other things in effect enacted, that the exclusive legislative authority of the Parliament of Canada extends to such local works and undertakings as, although wholly situate within a Province, are before or after their execution declared by the Parliament of Canada to be for the general advantage of Canada, or for the advantage of two or more Provinces; and whereas, not only the main lines of the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and North-western Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, but also all branch lines or railways connecting with or crossing them or any of them, are works, and each of them is a work, for the general advantage of Canada; and whereas, for the better and more uniform government of all such works, and for the greater safety, convenience and advantage of the public, it is desirable that Parliament should so declare: Therefore, it is hereby declared, that the said lines of railway, namely: the Intercolonial Railway, the Grand Trunk Railway, the North Shore Railway, the Northern Railway, the Hamilton and Northwestern Railway, the Canada Southern Railway, the Great Western Railway, the Credit Valley Railway, the Ontario and Quebec Railway, and the Canadian Pacific Railway, are works for the general advantage of Canada, and each and every branch line or railway now or hereafter connecting with or crossing the said lines of railway, or any one of them, is a work for the

general advantage of Canada." (See now, 51 Vict. cap. 29, secs. 177, 306, 307.)

This Act was passed in 1883, and was almost the natural result of allowing railways under different jurisdictions to cross each other. From that date, while Provincial railways still retained their right to cross and unite with Dominion railways, it was the result of their claiming and exercising the right that they came under the legislative authority of the Dominion legislature. It is manifestly impossible that Dominion railways shall be under Provincial authority (leaving out of the question, of course, the points which have been raised as to the right of the Provinces to legislate upon civil rights). Railways and other works connecting two or more Provinces are expressly excluded from Provincial control by the 10th sub-section of section 92 of the British North America Act. The only alternative was to declare all such Provincial railways as crossed, joined or were operated with Dominion railways to be for the general benefit of Canada, and subject to the legislative control of the Parliament of Canada. This the Dominion Parliament had the right to do, under the British North America Act, and in the exercise of this right, they passed the legislation already referred to.

The retaining in force of the local railway acts passed before 25th May, 1883 (the day on which the Act declaring the Provincial railways to be for the general advantage of Canada came into force) was essential to preserve the authority by which these railways were built; but the natural result of the legislation, is that every railway projected after that date which is intended to cross or unite with a Dominion railway falls within the legislative control of the Parliament of Canada, and the authority to construct it must apparently be derived from that body. This brings up a most important constitutional point, and one that affects not only Manitoba but every other Province; and upon this point the matter must be decided. We can do no more than state it, but the mere statement seems to be convincing.

By the 10th subsection of section 92 of the British North

America Act the Provincial Legislature has the power to legislate respecting "local works and undertakings other than such as are of the following classes :— * . * *c.* Such works as, although wholly situate within the Province, are before or after their execution, declared by the Parliament of Canada to be for the general advantage of Canada or for the advantage of two or more Provinces." Now, if we read into the Act the legislation of the Dominion which we have quoted (see particularly 51 Vict. cap. 29, secs. 306, 307), that section of the constitution, for the purpose of the case may be paraphrased, as follows :—"Local works and undertakings other than such as are of the following classes :— * * *c.* Each and every branch line or railway now or hereafter connecting with or crossing the line of the Canadian Pacific Railway, the Intercolonial Railway, etc."

A province intending to authorize the construction of a railway to cross a Dominion railway, must first demonstrate its constitutional right to build such a railway, and unless it can do so, its whole proceeding is illegal. We do not presume to say that the proof cannot be given, as the Attorney-general of Manitoba is no doubt well advised, but the problem seems to be a difficult one to solve.

A Characteristic Menu.

The following, said to have been prepared by a lady. is the bill of fare of a dinner given to the Arbitrators and others engaged in the arbitration between the Dominion and the Canadian Pacific Railway.

"He may live without love, what is passion but pining;
But where is the man who can live without dining?"

Lucile.

CHANCELLOR DAY

Adjournment

WEDNESDAY, AUG. 22, 1888.

C.P.R. *versus* THE QUEEN.

God Save the Queen.

Friends from a distance, of those engaged in the Arbitration are cordially invited. —Fares on the C. P. R. greatly reduced — Perfectly safe road — Six miles an hour through the grandest scenery on the continent — Accident insurance tickets gratis — "The cuttings are unusually wide and thoroughly drained; the embankments are very wide and solid; the bridges, resting on first-class masonry, are of twice the ordinary strength; the rails are of the best steel, manufactured under rigid inspection, and are laid with angle splices of double strength; the ties are large and closely laid, and the track is ballasted with the best materials." (*Vide* C.P.R. Adv't).

The most direct route to

PROSPERITY, TOWN LOTS AND — RHEUMATISM.

SOUP

Arbitration Consommé Shuswap Gumbo

FISH

C. P. R. Whale (wail), Van Horne Sauce, à la Hollandaise

ENTRÉES

British Columbia Fritters [Sticks

Dominion Pot Pie, Family Style, Served to all with Chop

Lawyer's Brains, with Sauce Supreme

Mountain Sheep Trotters, with Inspection Sauce

RELEVÉS

Engineer Roast, Canon Cuts, à la Trutch

Pièce de Résistance-Sir John's Ewe Lamb, Sauce Tartare, à la Pope

Mountain Goat, Baronet Range, Caper Sauce

Decoy Ducks, Howe Trussed, à la Tomlinson

Roast Cariboo, Gold Mint Sauce

VEGETABLES, à la Onderonk

Slope Squash, au Naturelle Scarlet Trestle Beans

Slide Mashed Turn-ups Early Rose Potatoes

Mud Sill Sprouts Canada Thistles

RELISHES

Letters from Home, Sauce Tendre

Canadian Olives, Stuffed with Dominion Bank Notes

Vancouver Town Lots, Price $20,000

Japanneries

ENTREMETS

Consultation Pudding, Sauce Diplomatique, à la Schreiber
Soufflée of Self-congratulation and Conscientious Fulfilment of Duty
Gelée of Pleasant Memories and Tender Friendships
Hospitalité Royale, Abbotsford
Bombe Glacée, à la Chancellor, Verdict 1889

FRUIT

Arbitration Cherries, Three on One Stem
Apples of Atalanta Broad Gauge Plums Sour Grapes

WINES and LIQUEURS, at Boom Prices
Warranted to go to the Heads but not to the Hearts of the Arbitration of '88

COFFEE
Black Canon, Strong and Clear for tired Brains without a Summer Holiday

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MUSIC
By the Local Band during Dinner

1. The Girl I Left behind Me
2. Tosti's "Good Bye"
3. My Love Has Gone a'sailing
4. Arbitration Slow March
5. Home Sweet Home
6. Gregorian Chants — Major "Kee-for" all
7. The Star Spangled Banner
8. God Save the Queen

Toronto University Law Faculty.

The announcement is made that the Law Faculty of Toronto University is finally established. It only wants lecturers. The announcement has also been made in the newspapers that the Chancellor is to be Dean of the Faculty, with Mr. Justice Proudfoot, Edward Blake, Q.C., D'Alton McCarthy, Q.C., and Mr. David Mills, as lecturers.

But whether this is to be taken *au sérieux* or not is the question. The establishment of the Faculty is too real a thing to be the subject of burlesque. But if the announcement is not a huge joke, it means that the Faculty is to exist on paper only. Messrs Blake and McCarthy are both Benchers of the Law Society, and are volunteer lecturers in the Law School, part of the scheme of which, as established by the Benchers, is that lectures shall be delivered by Benchers and others in addition to those delivered by the regular lecturers. Yet neither Mr. Blake nor Mr. McCarthy, nor any other Bencher, has in the whole course of existence of the Law School ever delivered a lecture therein. And it is not likely that they either will or can give any more attention to the University Law Faculty.

What the University requires is a staff of lecturers who have the time and inclination to lecture. The curriculum which we have had a glance at is an excellent one, but one that cannot be properly mastered without instruction.

The Proposed Law School.

Rumour hath it that "something is going to be done" by the Law Society this term in connection with the proposed Law School. What it is has not been made known as yet. But whatever is to be done should be done quickly if another year is not to be lost. Any radical change should be proclaimed before the beginning of the year at the latest, if the School is to be opened after next summer vacation. We understand that Trinity University will establish a teaching Faculty of Law in order to keep abreast of Toronto University. The result will be a division of strength; for three Schools cannot be properly maintained in Toronto.

The proper course for the Law Society to adopt is to set to work in earnest to establish a strong and permanent School, and make education in the School essential. If that be not done, the Universities who are teaching law and granting degrees there... will ask the Legislature to

permit their graduates to practise law without education under the auspices of the Law Society. It is not unlikely that the Legislature would grant this, and if it does, half of the Law Society revenue is gone at once.

Changes in the Judiciary.

Mr. Justice Patterson of the Court of Appeal of Ontario has been appointed to the vacancy in the Supreme Court of Canada occasioned by the death of the late Mr. Justice Henry.

Mr. James Maclennan, Q.C., takes Mr. Justice Patterson's place in the Court of Appeal.

Both appointments have occasioned universal expressions of satisfaction.

BOOK REVIEWS.

A Manual of Costs in the Supreme Court of Canada, High Court of Justice, Court of Appeal, County Courts, etc., with forms of bills of costs under the Ontario Judicature Act. By JOHN S. EWART, Q.C., of Osgoode Hall, Barrister-at-Law. Toronto: Carswell & Co. 1888.

Owing to the consolidation and revision of the Tariff, the second edition of this book had become practically useless. The present edition is very largely improved both in arrangement and contents, and includes fees and costs for almost everything arising in daily practice.

Index to the Consolidated Rules of Practice of the Supreme Court of Judicature for Ontario. By WILLIAM FRANK SUMMERHAYS. Toronto: Rowsell & Hutchison. 1888.

The official index to the Consolidated Rules being rather spare, opportunity was offered to provide a fuller one and Mr. Summerhays' work is intended to fill the want. The number of the rule as well as the page of the book is given for each reference.

REVIEW OF EXCHANGES.

Law Journal.—18th February, 1888.

Settlements on Widows' and Widowers' Children on re-Marriage. In *Re Cameron & Wells*, 57 L. J. Ch. 69, a widower, on re-marriage, settled property on his children by his first marriage. He then mortgaged the property, and a purchaser from the mortgagee refused to carry out the contract until it was held that the children of the first marriage were volunteers under the settlement. The learned writer, after citing some cases on the subject, points out the distinction between the re-marriage of a widower with children and of a widow. When a widower marries again the children of his first marriage are legally no part of the second wife's family. But when a widow marries again her children become part of her husband's family. "All this tends to show that the effect of a re-marriage on a widow's children is different from its effect on a widower's children. It has no legal effect on a widower's children, but it brings a widow's children within the family of her new husband. It gives them a legal father, under obligations no doubt more or less imperfect, but in accordance with the general scheme of the marriage law. If that is so, a widow's children are within the marriage consideration, because by the marriage their stepfather becomes subject to obligations to them, which do not exist in the case of a widower with children re-marrying."

American Law Review—March-April, 1888.

Some reflections on the Bar, its integrity and independence. by DANIEL DOUGHERTY. An address delivered before the Bar Association of New York.

Burden of proof in actions against carriers and other bailees, by SEYMOUR D. THOMPSON. The subject is treated under the following heads:—The initiatory burden is on the plaintiff, unless the defendant admits the facts and excuses himself; Proof of delivery to the bailee, and non-delivery or delivery in a damaged condition, casts upon the bailee the burden of explaining; non-delivery may be proved by demand and refusal which is a conversion, or delivery to the wrong person; Loss by theft; Burden on innkeeper to show manner of loss or pay damages, in case of a guest, but not of a boarder; As to breakage, leakage or damage; Application of foregoing principles to common carriers. Many authorities are cited.

American law of Strikes and Boycotts as Crimes, by ARTHUR JAMES SELFRIDGE. Cases are cited showing that conspiracies to raise wages &c. have been punished. The American statute law is referred to.

Deed of one partner, when binds the firm, by STEWART RAPALJE. The general rule requires special authority to one partner to bind the firm, and it is not sufficient authority merely that the partnership articles are under seal. The partner who executes the deed is bound though the others are not. The exceptions are illustrated by citation of cases.

Should Appellate Courts review the facts in actions at Law? by SAMUEL MAXWELL. The learned writer thinks that in both criminal and civil cases all the facts ought to be subject to review, even when found by a jury.

Ibid.—May-June, 1888.

The Uncertainty of the Law, by THOMAS M. COOLEY. A paper read before the Georgia Bar Association, the burden of which is to show that the law is reasonably certain.

Ancient Systems of Land Tenure in Polynesia, by W. D. ALEXANDER. It appears from this article that different systems prevail, from the village or tribe system to a quasi-feudal system.

Contingent and Exorbitant Fees, by P. BLISS. A strong paper against the system as tending to degrade the profession.

Constitutional Restrictions upon Legislation concerning Villages, Towns, Cities, and Counties, by J. R. BERRYMAN. The restrictive provisions are detailed, and the cases construing them are cited.

Motions for New Trial, by EUGENE MCQUILLIN. Concluded in the following number. A very full article on the practice. American statutes and cases are cited, and a few English authorities.

Ibid.—July-August, 1888.

Retrospective Decisions, by JOSEPH L. HEISKELL. A review of some constitutional cases.

Trusts, by D. M. MICKEY. An article on the recently formed commercial combinations, citing some cases in which trade combinations have been held to be against public policy and illegal.

What are Federal Questions? by D. H. PINGREY.

Foreign Divorces, by JAS. M. KERR. A great number of cases are cited treating largely though not altogether of the effect of domicil upon the rights of the parties.

THE

CANADIAN LAW TIMES.

DECEMBER, 1888.

ALTERATION OF JUDGMENTS, SENTENCES AND VERDICTS.

(Concluded)

II. *Civil proceedings.*

1. *Alteration of judgment before drawing up.*
2. *Varying minutes.*
3. *Alteration after entry.*

IN civil proceedings the judgment of the Court, whether interlocutory or final, is almost invariably drawn up in formal shape signed by an officer, and recorded or entered in some way or other in the books or records of the Court. Though the practice in this respect is somewhat different from that in criminal proceedings, the principle governing the cases will be found to be somewhat similar. It is true that in those cases in the Sessions which were cited in our last number, there appeared to have been records of some form kept of the various proceedings; and in one case referred to it was said that the last order which annulled a previous order, should have been returned with the *certiorari*, and not both, as there was but one existing order, namely, that which annulled the prior one (*a*). But

(a) *St. Andrews' Holborn* v *St. Clements' Dane*, Salk. 606.

were *sui juris* they might have any order they liked. No doubt they might if they asked for it and the Court thought it proper to make it. But after an order has been actually made by the Judge, between that and the drawing of it up by the Registrar, it is not competent to the parties, as it seems to me, though *sui juris*, to alter the order so made. The obvious course would be for the parties to come to the Court and say that they have agreed to a modification of the order."

In *Glasgow* v. *Glasgow* (*f*) it appeared that at the trial there was no proper evidence of posting up the proceedings against one of the defendants who had not appeared. Consent minutes of a judgment against another defendant were approved by the Court and judgment pronounced thereon. Subsequently the proper proof of posting up was produced, and it was asked that the judgment should be opened up and judgment pronounced against the absent defendant. Ferguson, J., granted the motion after consultation with the Chancellor and Mr. Justice Proudfoot. The same learned Judge in *Canadian Land & Emigration Co.* v. *Dysart* (*g*) followed *Glasgow* v. *Glasgow*, saying that in that case he "recalled a judgment upon a motion for judgment against one of the defendants, upon further evidence being adduced, and changed the conclusion. We were all then of the opinion that, at any time before formal judgment issued by the Court, the judgment, or part of it, might be recalled and a term imposed, or a change made. It is, of course, not a desirable thing to do, but circumstances may well justify its being done." In that case judgment dismissing an action was stayed pending an appeal, though the effect was to continue an interim injunction against the defendants restraining them from proceeding to collect taxes which had been levied upon the plaintiffs' property.

In a case in the Judicial Committee of the Privy Council (*h*), after judgment had been pronounced, but before

(*f*) 9 Ont. R. 511, note. (*g*) 9 Ont. R. 511.
(*h*) *Hebbert* v. *Purchas*, L. R. 3 P. C. 664.

the report and recommendation had been presented, or any order made in Council, two petitions were presented asking for a re-hearing of the appeal on the ground that it had been heard *ex parte* owing to the petitioners' want of means, and on the alleged ground that the decision was at variance with former decisions of the committee. After hearing argument in which it was stated that such re-hearings had before been allowed, Lord Hatherly delivered judgment as follows:—"Their Lordships are of opinion, in respect of the two petitions addressed to the Crown, that no further proceedings should be taken therein. Having carefully weighed the arguments, and considering the great public mischief which would arise on any doubt being thrown on the finality of the decisions of the Judicial Committee, their Lordships are of opinion, that expediency requires that the prayer of the petition should not be acceded to, and that they should be refused with costs."

The current of authority is therefore largely in favour of the existence of jurisdiction in the Court or a Judge to alter or vary a judgment pronounced at any time before it is formally drawn up.

2. Varying minutes.

The practice of moving to vary the minutes of an order is a well understood one, but there is authority which defines the limits within which the parties are held upon such a motion.

In *Hendrie* v. *Beatty* (*i*) an interim injunction was granted in terms of an undertaking which had been given by counsel for the defendants on a previous mention of the matter in Court, no argument taking place. In drawing up the order the Registrar was asked to insert an undertaking by the plaintiffs that nothing would be done on their part until the hearing. He declined to do this as the plaintiffs refused to give the undertaking. A motion was then made to vary the minutes. Proudfoot, J., said, "Had the matter been mentioned to me when the motion was made, it is

(*i*) 29 Gr. 423.

very probable that the injunction would only have been granted upon giving such an undertaking, but I cannot compel the plaintiffs to undertake. All that I could do would be to stay the injunction unless the undertaking were given. But the parties arranged, and I acted on the arrangement that an injunction should issue without specifying any such undertaking. What I am asked to do, then, is practically to reverse the order already made. When the minutes of an order are spoken to, I understand that nothing can be done at variance with the order, but additions or variations may be made, so as to carry out the intention of the Court in pronouncing it. Here the intention of the Court is to be found in the undertaking of the defendants, and in the subsequent arrangement. It does not seem to me that this necessarily implies a mutual undertaking, so that I would be justified in refusing to allow the injunction to issue without it, however reasonable I may think the request." The Court, however, stayed the issue of the order for ten days, to enable the defendants to make a substantive motion for an injunction restraining the plaintiffs from doing anything detrimental, in case they refused to accede to the defendants' request to give the undertaking.

3. Alteration after entry.

The question whether or not an order or judgment can be altered by a Judge after the order has been drawn up has occasioned a good deal of controversy. We may, however, take it to be an established rule that the Court, having inherent power always to correct its own records, may amend or vary a formally entered order so as to make it conform to the judgment which was actually pronounced.

In *Re Swire* (*j*) an order of the Court of Appeal had been drawn up and entered, and a motion was made to vary it on the ground that from its form it might be contended that it determined questions which had not been before the Court. Cotton, L.J., said, "This is an appli-

(*j*) 30 Ch. D. 239.

cation of a somewhat unusual nature—a motion to vary an order after it has been passed and entered. * * It is the duty of the Registrar at once to pass and enter the order when settled, unless some of the parties state that they intend to move to vary it. It would cause great delay in the Registrar's office if anyone, by simply saying, 'I object to that form of order,' without giving any notice to vary it, could prevent the Registrar from going on to pass and enter it. But although that is the regular course, and it is only in special circumstances that the Court will interfere with an order which has been passed and entered, except in cases of a mere slip or verbal inaccuracy, yet in my opinion the Court has jurisdiction over its own record, and if it finds that the order as passed and entered contains an adjudication upon that which the Court in fact has never adjudicated upon, then, in my opinion, it has jurisdiction, which it will in a proper case exercise, to correct its record, that it may be in accordance with the order already pronounced." Lindley, L.J. "This case has raised a discussion of some importance, because it was contended that when the order of the court was passed and entered it could not be put right, even although as drawn it did not express the order as intended to be made. I protest against any such notion. There is no such magic in passing and entering an order as to deprive the Court of jurisdiction to make its own records true, and if an order as passed and entered does not express the real order of the Court, it would, as it appears to me, be shocking to say that the party aggrieved cannot come here to have the record set right, but must go to the House of Lords by way of appeal. According to the old practice there was no difficulty, because the ordinary practice in the Chancery Division was, that after a decree an order had been passed and entered, any error could be put right by an application to rehear, unless the order had been inrolled. After inrolment the Court had no power over its decree. But even then there was power to vacate the inrolment on proper grounds, and when that had been done the Court again had power over its own decree. Now, re-hearing has been

abolished, and inrolment has become obsolete, but does it follow from that that the Court cannot correct a blunder of the kind I have assumed? I maintain that it has such a power, and I am glad to find that Lord Penzance and the House of Lords have asserted it. It appears to me, therefore, that if it is once made out that the order, whether passed and entered or not, does not express the order actually made, the Court has ample jurisdiction to set that right, whether it arises from a clerical slip or not." And Bowen, L.J., after referring to what had been said with respect to Chancery practice, remarked that it was a power which had been exercised for hundreds of years by the Common Law Courts, and it would indeed be strange if the power was found to have disappeared after the Judicature Act was passed.

In this case the party applying, though successful in varying the order, was directed to pay costs, the correct practice being to apply to vary the minutes when settled. This course is pointed out as the proper one by Sir George Jessel in *General Share and Trust Co.* v. *Wetley Brick and Pottery Co.* (*k*).

In *Lawrie* v. *Lees* (*l*) Lord Penzance said, "I cannot doubt that under the original powers of the Court, quite independent of any order that is made under the Judicature Act, every Court has the power to vary its own orders which are drawn up mechanically in the registry or in the office of the Court—to vary them in such a way as to carry out its own meaning, and where language has been used which is doubtful, to make it plain. I think that power is inherent in every Court. Speaking of the Courts with which I have been more familiar all my life, the Common Law Courts, I have no doubt that that can be done, and I should have no doubt that it could also be done by the Court of Chancery. Moreover, having regard to the orders made under the Judicature Act, I should myself have thought that it would very well have come under those orders." In that case an appeal was dismissed without

(*k*) 20 Ch D. 130. (*l*) 7 App. Ca. 35.

prejudice to any application which might be made to the Court below to vary its own order by stating clearly the effect of those matters which the appellant contended were variable by appeal.

In *Livingstone* v. *Wood* (*m*) Ferguson, J., said, "I am of the opinion that there is power to amend the decree if it is not in accordance with the judgment, that is to say, if it is not the decree really pronounced by the Court, and I think that the question to be determined is, whether or not the judgment, as I find it reported, authorized the insertion in the decree of the declaration that is now complained of." When a judgment is made on consent it may be amended so as to conform to the terms of the consent (*n*). But if any variation is made in the consent it should be made before the order is drawn up (*o*).

By Rule 780 "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission may at any time be corrected by the Court or a Judge on motion without an appeal." It is probable that this jurisdiction existed independently of this rule as the Courts have always had power to keep their own records true. It is essential to observe the mode of proceeding under this rule. For in *Blake* v. *Harvey*, which we have already cited, where an amendment was made without a motion, the amendments were struck out. Lord Justice Cotton, citing the rule in question said, "No such motion was made, no such summons was taken out, so assuming this to be an error arising from an accidental slip or omission, no proper steps were taken to rectify it. It is very improper to make an addition to the records of the Court without the sanction of an order." And Lindley, L.J., said, "This was an improper addition to the records of the Court, and whether it was formally passed and entered or not makes no difference; having got on the records irregularly it ought to be struck out."

(*m*) 29 Gr. 157.

(*n*) *Merchants' Bank* v. *Grant*, 3 Ch. Ch. 64.

(*o*) *Davis* v. *Davis*, 13 Ch. D. 861, explaining *Attorney-General* v. *Tomline*, 7 Ch. D. 388.

Where there has been fraud or concealment in procuring the order or judgment it is of course ground for vacating it, and, while no Court would refuse to hear an application based upon fraud, it appears that where the fraud has been practised on the Court of Appeal in England at least they will require the party injured to proceed by original process. In *Flower* v. *Lloyd* (*p*), the Court of Appeal reversed a judgment restraining the defendant from committing an alleged infringement of the plaintiff's patent. After the order of the Court was passed and entered the plaintiffs applied to have the appeal re-heard with fresh evidence, on the ground that when an expert sent down by the Court, and whose evidence was in fact the only material evidence before the Court as to the nature of the defendants' process, examined the defendants' works, they had fraudulently concealed from him parts of the process. Sir George Jessel said, "If there were no other remedy I should be disposed to think that the relief now asked ought to be granted, for I should be slow to believe that there were no means whatever of rectifying such a miscarriage if it took place; but I am satisfied that there is another remedy." His Lordship then states that the old practice remains where not interfered with by the new rules, and by that practice there was jurisdiction to hear an original bill to impeach a decree for fraud. Then there was the practice by which, on the discovery of subsequent matter which showed that the decree was wrong, though there was no fraud in obtaining it, a supplemental bill could be filed. The jurisdiction of the Court of Appeal is then said to be appellate only, with original jurisdiction limited to that which is necessary for the determination of an appeal, and the amendment, execution, and enforcement of any order made on such appeal. Therefore it was said that, when the Court of Appeal had once determined an appeal, it has no further jurisdiction. Lord Justice James explained his view to be that the injured party had not a right to have the cause re-heard until he showed fraud,

(*p*) 6 Ch. D. 297.

but that a distinct issue of fraud should be raised and that issue tried, which must be done in a Court of original jurisdiction. The jurisdiction of the Court of Appeal in Ontario is substantially the same, the original jurisdiction being allotted to it "for all the purposes of and incidental to the hearing and determination of any such appeal, and the amendment, execution, and enforcement of any judgment or order made on such appeal, and for the purpose of every other authority given to the Court of Appeal" by the Act (*q*).

There is also power given to this Court by the original Act "to quash proceedings in cases brought before it, in which appeal does not lie, or when such proceedings are taken against good faith" (*r*). That this gives the power which is denied to the English Court of Appeal in *Flower* v. *Lloyd* may well be argued, for it could not have been intended that the Court should have jurisdiction to set aside all proceedings of a fraudulent nature before judgment, but not the judgment based upon them. Nor can it be denied that the inherent jurisdiction lies in the Court, apart from statute or rules, for in *Flower* v. *Lloyd* it was said that the relief might have been granted if there had not been another remedy (*s*).

That the House of Lords not only possesses the power but will act upon it appears from *White* v. *Tommey* (*t*), where it is said, "although in any question decided by this House upon appeal the matter is finally settled between the litigant parties, it is always subject to this condition, that if one party has, by any misrepresentation, I will not put it so high as to say by fraud, for I do not wish to use harsh terms, but, if by misrepresentation, inadvertently (if you will) introduced, a party has led the House into an error, has led it to suppose that something is going on irregularly, all the commonest principles of justice compel this

(*q*) Jud. Act s. 50.

(*r*) Jud. Act, s. 46.

(*s*) See *Staniar* v. *Evans*, 34 Ch. D. 470, where a Judge varied his own order which had been made without a full knowledge of the facts.

(*t*) 4 H. L. C. 313.

House, as they must compel any other tribunal, to interfere to prevent its own decisions from being made the machinery for effecting a fraud, or the machinery for effecting that which, if not done *per incuriam*, would have been a fraud."

In the judicial committee of the Privy Council however, it has been held that the discovery of new evidence is no ground for a re-hearing of an appeal. In *Venkata* v. *Court of Wards* (*u*) an application was made to re-hear on the ground that new documentary evidence had come to light which would have altered the conclusion arrived at. The committee were of opinion that there was no such new material disclosed as would have affected the result. But proceeding on the assumption that there was, in order that the fullest discussion of the matter might be had, they refused the petition. Lord Watson said, "It is not said that there was any error in framing the judgment of this Board, or that it did not fully and accurately express what the board intended to decide. Then it was reported to Her Majesty and was confirmed by regular order in council. No authority has been cited to their Lordships which can warrant them in granting a re-hearing under such circumstances as these. It is quite true that there may be exceptional circumstances which will warrant this board even after their advice has been acted upon by Her Majesty in Council, in allowing a case to be re-heard at the instance of one of the parties. The cases in which that may be competently done are explained by Lord Brougham in the case of *Rajunder Narain Rae* v. *Bijai Govind Sing* (*v*). His Lordship properly describes this privilege, when allowed not as a right, but as an indulgence. * * Even before report whilst the decision of the board is not yet *res judicata* great caution has been observed in permitting the re-hearing of appeals."

The principles upon which the Judicial Committee proceed are well set forth in the case last cited.

(*u*) 11 App Ca. 660.
(*v*) 2 Moo. Ind. App. Ca. 181; 1 Moo. P. C. 117.

In that case the appellants were infants, and the agent whom the Court below had appointed and supplied with grounds to prosecute the appeal absconded. An order was made that appeal books should be lodged within a certain time. Default was made, and the appeal coming up for hearing default was again made, and on an *ex parte* hearing the appeal was dismissed. The order drawn up in this case was for dismissal, importing an affirmance of the decree of the Court below, which was contrary to the usual practice. It appears that when the case is heard either by argument or by investigation of the case by means of the printed case by a member of the board, or by the Lords, the dismissal both in the Judicial Committee and in the House of Lords, imports affirmance and becomes a precedent. But when the appellant does not prosecute the appeal, the dismissal does not import affirmance. Subsequently a petition was presented by one of the appellants, who had meanwhile attained his majority, to have the appeal re-heard, or rather to have the dismissing order rescinded and the appeal restored for hearing. The committee were of opinion that a proper case for indulgence was made out if the power to re-hear existed. They held that they had power to amend the order for dismissal by striking out that portion which affirmed, and then to rescind upon terms, and this was done, and the appeal restored for hearing. The case is a very instructive one upon the power of a Court of last resort to re-hear, and many precedents are cited both in the judgment of Lord Brougham and in a note to the report of cases in which the power had been excercised. We may gather from the report that the Judicial Committee has the same power as the Courts to rectify mistakes and keep its records true. "The House of Lords," said his Lordship, "exercises a similar power of rectifying mistakes made in drawing up its own judgments, and this Court must possess the same authority. The Lords have, however, gone a step further, and have corrected mistakes introduced through inadvertance in the details of judgments; or have supplied manifest defects in order to enable the decrees to be enforced, or

have added explanatory matter, or have reconciled inconsistencies. But with the exception of one case in 1869, of doubtful authority, here, and another in Parliament of still less weight in 1842 (which was an appeal from the Privy Council to Parliament, and at a time when the Government was in an unsettled state), no instance, it is believed, can be produced of a re-hearing upon the whole cause, and an entire alteration of the judgment once pronounced." His Lordship then proceeds to give instances of cases in which jurisdiction has been exercised, and they show that it is only in cases of correcting errors which have occurred in drawing up the judgments pronounced, and those in which by inadvertence a party has not been heard. "It is impossible to doubt that the indulgence extended in such cases," the report proceeds, "is mainly owing to the natural desire prevailing to prevent irremediable injustice being done by a Court of the last resort, where by some accident without any blame the party has not been heard, and an order has been inaccurately made, as if the party had been heard."

In *Tommey* v. *White* (*w*) judgment had been pronounced by the House of Lords allowing an appeal which had been argued *ex parte*, the respondent failing to attend because they did not anticipate such a result. The report does not show whether a formal record of the judgment was drawn up or not, but it is presumed that it was. A petition was subsequently presented to the House for leave to re-hear the appeal. Lord Truro, L.C., said, "It appears that judgment —a complete and final judgment—has been pronounced by your Lordships' House in this case. That judgment can only be vacated by a special Act of Parliament, to enable the parties, if injustice can be proved to have been done, to be again heard. I remember only one case in which such an Act was passed for such a purpose. Here I cannot say that any grounds have been made out to call on your Lordships to entertain this application. There is no precedent whatever, without an Act of Parliament passed for that purpose, in which a case has been re-heard at the bar of this House, after a final judgment was pronounced."

(*w*) 3 H. L. C. 69.

In a note to this judgment, however, it is stated that a a judgment in one case was amended. In remitting a case to a Scotch Court a direction was made that both parties should be examined, the House being ignorant of the fact that one party was dead at the time. The matter was subsequently brought before the House and it was ordered that the clause as to examination should be struck out (*x*).

After a matter has been argued and determined, and the order or judgment has been formally drawn up, and no fraud or misrepresentation is alleged, and no inadvertence has occurred in making the order or pronouncing the judgment, and if it is not alleged that the order or judgment is an untrue record, there is no more power in the same Judge or Court to re-hear the matter than there is in the House of Lords to re-hear its own judgment. The power formerly did reside in the Court of Chancery. Sir George Jessel said, in *Re St. Nazaire* (*y*), "Part of this old jurisdiction of the Lord Chancellor was a right to re-hear his own decisions, or the decisions of a preceding Lord Chancellor; and similar powers passed under statute to the Master of the Rolls and the Vice-Chancellor, and they also had a right to re-hear their own decisions and the decisions of their respective predecessors. At first that was an unlimited right, as I said before; it was afterwards limited by general order to twenty years, and finally to five years, and that existed down to the time of the passing of the Judicature Act." His Lordship then characterizes this jurisdiction as appellate and shows that it was transferred to the Court of Appeal by the Judicature Act. This, however, was a peculiar jurisdiction. It cannot be argued from this case that no order can be re-heard, because there is a great deal of jurisdiction, in its nature appellate, which has not been transferred to the Court of Appeal. It is not therefore authority for the broad proposition that an

(*x*) On a subsequent petition to the House in *Tommey* v. *White*, the Lords being convinced that a suppression of the truth had been practised on them, rescinded certain proceedings based upon the misrepresentations. *White* v. *Tommey*, 4 H. L. C. 315, cited from, *supra*.

(*y*) 12 Ch. D. at p. 98.

order or judgment once pronounced and drawn up cannot be altered. That an application to re-hear cannot be made after a full hearing may be laid down as established. But where an order or judgment has been pronounced *ex parte*, either from inadvertence or because its nature was such that it might in the first instance have been made *ex parte*, it does not follow from the authorities that it may not be enquired into again by the same tribunal.

The contrary was decided in *McNabb* v. *Oppenheimer* (*z*), and though it is now provided by Rule 536 that "any party affected by an *ex parte* order, except the party issuing the same, may move to rescind or vary the same before the Judge or officer who made the order, or any Judge or officer having jurisdiction, within four days from the time of its coming to his notice, or within such further time as the Court or Judge may allow, and whether it has been acted upon by the party issuing the order or not," yet there may be cases not falling within the rule to which the principle in question applies.

An examination of the authorities cited in *McNabb* v. *Oppenheimer* will show whether they support the decision. In *Shaw* v. *Nickerson* (*a*), an order was made *ex parte* to commit the defendant to close custody, his attorney having mistaken the day of the motion. The learned Judge who made the order suspended it and appointed a day to show cause, whereupon after argument he rescinded it. Robinson, C.J., upon a rule to set aside the second order said, "Mr. Justice Sullivan sitting in chambers must be allowed to have authority, in his discretion, to open again an order which has been granted by himself; or even to rescind it before it has been carried into effect, upon his discovering that he has made it inadvertently or that he has been surprised into making it by any perversion or concealment of facts; but here, all that was done was to suspend the order that the opposite party might be heard. * * Under such circumstances it would have been unreasonable not to have opened the rule and allowed the defendant to be heard."

(*z*) 11 P. R. 214. (*a*) 7 U. C. R. 511.

In *Kidd* v. *O'Connor* (*b*), Chief Justice Harrison cites this case with approval, and points out that it is not improper to apply first to the Judge whose order is complained of before appealing.

In *Thompson* v. *Becke* (*c*), Lord Denman, C.J., speaking of a party who had applied to a Judge to review his own order and had been unsuccessful, and had then appealed. "Knowing that the Judges sometimes review their own orders, they have taken their chance of such a result in this case; and they must abide by the decision." It was held that after a second application to the Judge the Court would not allow an appeal. If the second application had been treated as beyond the Judge's jurisdiction, the application to the Court might have been entertained. But the authority of the Judge to re-hear his order was recognized.

In *Re Allen* (*d*), if was held that it was proper to apply first to a Judge who made an *ex parte* order to rescind it before appealing to the full Court.

In *De la Pole* v. *Dick* (*e*), Mr. Justice Kay thought that he could not vary an order, and gave leave to appeal. In that case circumstances had transpired which made it desirable to change the order, as it was unworkable without the change. The authorities (many of them collected in a case in the Privy Council) (*f*) show that the House of Lords has constantly made such alterations, and that the power of the Courts to amend or alter their records so as to carry out their intention is undoubted. The statement in the report is not a judgment nor even a dictum of Kay, J., and the course adopted was probably adopted for caution's sake.

Flower v. *Lloyd* (*g*), has been already referred to as a case of impeaching a judgment for fraud, and the parties

(*b*) 43 U. C. R. at p. 200.
(*c*) 4 Q. B. 759.
(*d*) 31 U. C. R. at p. 495.
(*e*) 29 Ch. D. 35.
(*f*) *Rajunder Narain Rae* v. *Bijai Govind Sing*, supra.
(*g*) Supra.

were sent by the Court of Appeal to a Court of original jurisdiction instead of to a higher appellate tribunal.

All these cases go to show that the power existed to rehear under certain circumstances, and that of obtaining an order on *ex parte* evidence or argument has been appropriately put under the head of mistake, or surprise upon the Judge, entitling him to do that which he would have done in the first instance had he been fully informed.

We may add to the cases cited in *McNabb* v. *Oppenheimer*, a case of *Hughes* v. *Field* (*h*), where an *ex parte* order of the Master in Chambers was set aside by Mr. Justice Osler, who held that the application to him was not an appeal, but might have been made to the Master who might have rescinded his own order. And in Manitoba Chief Justice Taylor has refused to follow it (*i*).

(*h*) 9 P. R. 127.

(*i*) *Ontario Bank* v. *Page*, 3 M. L. R. 679; see also *N. W. Nat. Bank* v. *Jarvis*, 2 M. L. R. 56.

COMMERCIAL "TRUSTS" IN ROME.

In these days of boycotting and strikes, of combinations of workmen and intimidation of contractors, of colossal "Trusts" and monopolies, of gambling in grain and "cornering the market," we are apt to imagine that the evils referred to are wholly of modern growth, and that they are the outcome of modern ingenuity, selfishness and greed. It will be found, however, that the human nature of this era is much the same as was the human nature of years ago, and that the same cupidity which is the parent of the grievous oppressions of to-day was equally fruitful of abuses in mediæval times. It is true that they did not formerly call themselves Knights of Labour or Land Leaguers, "Trusts" or Brokers, but the evils which were wrought in those days were much the same in character as those which constitute the reason for existence of the modern scourges above indicated. These thoughts are suggested by a perusal of the edict of the Emperor Zeno, issued to the Praetorian Prefect of Constantinople, A.D. 483 (code IV. 59), which runs as follows:—

"We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use, whatever its nature may be, either of his own authority, or under a rescript of an Emperor already procured, or that may hereafter be procured, or under an Imperial decree, or under a rescript signed by Our Majesty: *nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves.* Workmen and contractors for buildings, and all who practise other professions, and contractors for baths are entirely *prohibited from agreeing together that no one may complete a work contracted*

for by another, or that a person may prevent one who has contracted for a work from finishing it: full liberty is given to any one to finish a work begun and abandoned by another, without apprehension of loss, and to denounce all acts of this kind without fear and without costs. And if any one shall presume to practise a monopoly, let his property be forfeited, and himself condemned to perpetual exile. *And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay 40 pounds of gold.* Your court shall be condemned to pay 50 pounds of gold if it shall happen through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants, shall not be carried into effect."

It is matter for regret that some such vigorous legislation as this is not enacted and enforced at the present day.

A. H. MARSH.

EDITORIAL REVIEW.

The Divisional Courts.

Though there were many prognostications of mistakes, confusion and miscarriages in the Queen's Bench and Common Pleas Divisions at the Michaelmas sittings, owing to the change in practice from orders *nisi* to notices of motion, they were not fulfilled. Several days before the opening of Court the completed lists were exposed, and instead of time being taken up in hearing motions for orders *nisi*, the Courts proceeded to hearing arguments at once.

The diminution in the lists which it was thought would take place was not as great as was expected; but when litigants learn that an application to the Divisional Court means, in case of loss, the payment of costs, there will be fewer motions.

Recent Appointments.

In consequence of the elevation of Mr. Maclennan to the Court of Appeal his seat in convocation became vacant. The Benchers have appointed Mr. Nicol Kingsmill to be a Bencher in his place.

The Benchers having found it necessary to appoint an assistant reporter to the Court of Appeal, applications were asked for, and Mr. R. S. Cassels has been appointed.

BOOK REVIEWS.

A Treatise on the Law of Executions in civil cases, and of proceedings in aid and restraint thereof. By ABRAHAM CLARK FREEMAN, author of a treatise on the Law of Judgments, and also of a treatise on the Law of Co-tenancy and Partition. Second Edition. San Francisco: Bancroft—Whitney Company, 1888.

This valuable work in two large volumes is based largely upon American cases and statutes. The principles however being very much the same as those of our own law, the book is a valuable reference book for both English and American law. On the matter of homesteads, and exemption laws, which are now a feature of Canadian municipal law, it will be especially valuable, as we are following in the footsteps of American statutes. The scope of the work is wide. In addition to dealing with executions proper it deals with garnishment, interpleader and equitable remedies. We are disappointed at not finding something more respecting the now prevalent practice of appointing a receiver when there is no other way of reaching the debtor's assets.

A Treatise on the Law of Landlord and Tenant, with special reference to the American law. By H. L. GEAR, of the San Francisco Bar. San Francisco: Bancroft—Whitney Co. 1888.

A Manual of the Law of Wills as determined by the leading Courts of England and the United States. By CHARLES FISK BEACH, Jr., of the New York Bar. Editor of the "American Probate Reports," author of "The Law of

Contributory Negligence," etc. Assisted by EDWIN A. PRATT, of the Louisville Bar. San Francisco: Bancroft—Whitney Co. 1888.

These books continue the series commenced some time ago by these eminent publishers. They are small in volume, but contain an immense amount of matter; the gist of each citation being compressed into the smallest space. For reference books this is not an undesirable feature, but for treatise writing many would object to it.

A table of cases and Index to the notes in the 160 Volumes of American Decisions and American Reports. Together with a brief enumeration of the cases reported therein on each of the various titles of the law. San Francisco: Bancroft—Whitney Co. 1888.

It is said that a dictionary though an interesting book in the main, has not much thread to the story. An index is at the best uninteresting, but this one furnishes the thread through the labyrinth of law to be found in these valuable reports. As they are largely consulted this book will be of infinite service to those who have occasion to use them.

REVIEW OF EXCHANGES.

American Law Register.—November, 1887.

What Publications of Commercial Agencies are Privileged, by LOUIS M. GREELEY. If the communications are made only to those who are interested in them, it is said that they are privileged; but if they are circulated broadcast so as to reach those who are not directly interested they lose their privilege. In one case it was held that the communication was privileged only when made direct and not through the medium of clerks and printers, but this has been overruled. The entry of matters of record, as an unsatisfied judgment, upon the general notification sheet, has been held to be privileged, but not where the judgment has been paid, though no entry of satisfaction appears of record. But where it is stated in the report that the judgment has been paid the communication is privileged. It is thought that a notification of a chattel mortgage is not privileged.

Ibid.—December, 1887.

Some Effects of the Husband's Abandonment on the Wife's Power to Contract, by CHARLES A. ROBBINS. When the wife's society has been wilfully abandoned by the husband, the rule is said not to operate that she is prevented from contracting because of the danger that she might be taken in execution and her husband be thus deprived of her society. There must be a complete abandonment. She may then contract so as to pledge his credit, and is entitled to her own earnings and those of her minor children.

Ibid.—January, 1888.

An Interesting Question in Eminent Domain under Constitutional Law, by R. MASON LISLE. In Pennsylvania it has been decided that where a railway company constructed and operated an elevated road upon property owned by itself fronting on one side of a street, it was not liable under the constitution for depreciation in value of property fronting upon the opposite side of the street. This case is commented on.

Ibid.—February, 1888.

A Few Thoughts on the Relation of the Courts [illegible] he Law Schools to Legal Education, by HENRY BUDD. The ord[illegible]ry Law School course of two years is thought, and rightly so, too [illegible] to give the requisite knowledge to a practitioner.

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THE

CANADIAN LAW TIMES.

OCCASIONAL NOTES.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

[BOYD, C., AND OSLER, J. A., 29TH OCTOBER, 1887.

Re DWIGHT AND MACKLAM.

Contempt of Court—Telegrams—Subpœna—Privilege—45 V. c. 93, s. 18 (D.)—Telegraph Company, officers of.

Upon the trial of a petition under the Ontario Controverted Elections Act, a telegraph operator was examined as a witness and was asked to produce the originals of certain telegrams alleged to have been sent by the respondent to certain voters the day before the election.

The witness said that he had burnt the telegrams in question with others after being subpœnaed and while the trial was actually going on, upon instructions received from the general manager of the telegraph company in whose service he was. He stated that these telegrams with others should have been destroyed before, in accordance with a standing rule of the company, but that he had neglected to

do so at the proper time. The instructions to destroy the messages were in the form of a telegram from the general manager, which was produced by the witness.

Upon the return of an order *nisi* to commit the general manager and the operator for contempt of Court, it was objected that no original subpœna had been exhibited to the operator when he was served with what purported to be a copy, and that none was produced in Court; and it was argued that the making away with the messages was not a contempt unless the witness was duly subpœnaed to produce.

Held, that the question was not whether there had been a proper service of a subpœna: but whether there had been an interference with evidence which but for that interference would have been before the Court. The documents were in existence at the beginning of the Court; during the trial they were destroyed by the deliberate action of the general manager; and the Court was thereby hindered in the prosecution of an investigation of a public nature. The manager and operator were guilty of a contempt of Court.

No privilege attaches to telegrams in the possession of a telegraph company.

45 V. c. 93, s. 18 (D.), should not be read as giving an absolute privilege.

The operator was the proper person to subpœna to produce the telegrams, as he had the control of them and the ability to produce them.

H. Cameron, Q.C., for Dwight and Macklam.

IN CHAMBERS.

[OSLER, J. A., 4TH JULY, 1887.

In Re LINCOLN AND NIAGARA DOMINION ELECTION PETITION.

PATTISON v. RYKERT.

Election Petition—Alteration—Spoliator—Ratification—Amendment.

After an election petition had been filed two clerks of the solicitors and agents for the petitioner were allowed to compare it with an engrossed copy, and finding that the

two were different, they altered the filed petition so as to correspond with the copy, adding in one place the word "treating," which had the effect of introducing a charge of a corrupt practice not in the original. The copy served upon the respondent after this alteration corresponded with the petition as altered. It was not shewn and it was denied that the petitioner knew of the alteration.

Held, that the addition of the word "treating" was an alteration in a material part; but that the clerks in doing what they did were not the agents of the respondent or his solicitors. As the document was in the possession of the Court, such an alteration, made by persons who were mere strangers or spoliators, had not the effect of destroying it. The service of the petition in its altered condition could not, in the absence of knowledge of the alteration, be treated as a ratification by the respondent.

It was ordered that the petition served should be restored to its original state, and that the copy served should be amended to conform with the petition as it was when filed.

By consent of the petitioner the Supreme Court of Canada allowed an appeal from the decision of OSLER, J.A., and sustained the preliminary objections, without costs.

McCarthy, Q.C., and *Aylesworth*, for the respondent.
Lash, Q.C., for the petitioner.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ROSE, J., 23rd NOVEMBER, 1887.

ROGERS v. WILSON.

Motion for judgment—Rule 322—Admissions in affidavit on former motion—49 V. c. 20, s. 7.

The defendant made two mortgages to the plaintiff on the same property; and the first being overdue, the plaintiff brought this action for sale, payment, etc. After service of the writ, the amount due and costs were tendered by the defendant, and also an assignment of the first mortgage for

execution, under 49 V. c. 20, s. 7. This the mortgagee refused to execute. A motion for a *mandamus*, on which the above facts were set forth in affidavits of the defendant and his solicitor, to compel him to execute the assignment was made, and dismissed. (See 7 C. L. T. Occ. N. 399.)

A statement of claim was then filed, which set forth the first mortgage only, and a statement of defence in which the first mortgage was admitted, and the fact of the tender and refusal set up. The plaintiff simply joined issue. The pleadings contained no reference to the second mortgage.

On motion for judgment under Rule 322;

Held, that the admissions made in the defendant's affidavit filed on the motion for the *mandamus* could be read upon this motion; and that in view of what was held upon the former motion there must be judgment for the plaintiff upon the pleadings and affidavit.

Held, also, that a motion under this rule is properly a Court motion.

A. M. Taylor, for the plaintiff.

C. C. Robinson, for the defendant.

[But see as to the last point *McGillicuddy* v. *McCarthy*, 7 C. L. T. Occ. N. 165, *Ed.*]

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST DECEMBER, 1887.

PIERCE v. PALMER.

Appeal—Waiver—Motion to extend time for complying with order appealed from.

By an order of Boyd, C., 12 P. R. 275, 7 C. L. T. Occ. N. 401, a motion by the defendant to set aside a judgment for irregularity was refused; but the defendant was let in to defend upon paying into court or securing $700 within a month. The defendant moved for and obtained an order extending the time for paying the money in, and then appealed from the part of the order refusing to set aside the judgment for irregularity.

Held, that the defendant had waived his right of appeal from the order by obtaining an enlargement of the time for complying with it.

C. J. Holman, for the appeal.

Hoyles, contra.

REID v. MURPHY.

Interpleader—Sale of goods—Sheriff's charges.

The decision of PROUDFOOT, J., 12 P. R. 246; 7 C. L. T. Occ. N. 403; was reversed on appeal.

After an interpleader order is made at the instance of a sheriff, the special jurisdiction of the Court under the Act relating to interpleading arises, by which the writ of execution, as such, ceases to operate, and the sheriff in selling the goods seized thereunder acts, not for the execution creditor, but for the Court under the interpleader order.

Where, therefore, a sheriff, under such circumstances, sold goods which were found by the event of an interpleader issue not to have been the goods of the execution debtor but of the claimant, and paid the proceeds into Court less his charges for possession money and expenses of sale, etc.,

Held, that he was not liable to refund to the claimant the amount deducted for such charges.

The claimant's remedy is to recover the amount of such charges from the execution creditor, which he can do in a summary way.

Bicknell, for the sheriff of Wentworth.

Hoyles and *Beasley*, for the claimant.

McKAY v. BAKER.

Costs, security for—Husband and wife—Nominal plaintiff.

Action to remove a cloud from the title to certain land of the plaintiff, a married woman, whose husband when in embarrassed circumstances had bought the land, and taken a conveyance in her name. The plaintiff had no separate estate, and her husband was not a person of substance. There was no trust between the husband and wife.

Held, reversing the order of PROUDFOOT, J., in Chambers, that though suing alone and without separate estate, a married woman is not required to give security for costs. The only person who could be plaintiff on the title was the wife, and her husband could not be joined as a necessary or even a proper party. This case did not come within the class of cases where a nominal and insolvent plaintiff is put forward, while the substantial litigant keeps in the back ground in order to avoid liability for costs; and an order for security for costs was set aside.

C. J. Holman and *A. D. Cameron*, for the plaintiff.
Lynch-Staunton, for the defendant.

[BOYD, C., 22ND NOVEMBER, 1887.

LICENSE COMMISSIONERS v. COUNTY OF FRONTENAC.

Canada Temperance Act—Provincial Acts in furtherance thereof—Constitutionality—Revision of the Statutes of Canada.

Held, that the adoption of the Canada Temperance Act by the municipality of Frontenac has not been changed or interfered with by the revision of the Statutes of Canada.

The effect of the revision of the statutes, though in form repealing the Acts consolidated, is really to preserve them in unbroken continuity.

Held, also, that R. S. O. c. 181, ss. 92, 93, 105, 106; 41 V. c. 14, ss. 6, 8; 44 V. c. 27, ss. 11, 14, 16; 47 V. c. 34, s. 34; 50 V. c. 33, by which ways and means are provided for the enforcement of the Canada Temperance Act by the application of local funds raised by local taxation or otherwise in the county, are not *ultra vires* the local legislature.

The general law as to prohibition respecting all Canada, which can only be enacted by the Dominion, being localised by municipal suffrages, its enforcement becomes also a matter of local importance in the province, within the meaning of the B. N. A. Act, s. 92, item 16.

Britton, Q.C., for the plaintiffs.
Walkem, Q.C., and *Agnew*, for the defendants.

[14TH DECEMBER, 1887.

In Re BLACK.

Escheat—Death of owner of real estate intestate and without heirs—49 V. c. 16, s. 14—Application by Attorney-General—Reference.

J. H. B., being the owner of real estate, died intestate and without heirs. On an application by the Attorney-General for Ontario, under 49 V. c. 16, s. 14, a reference to the Master to make enquiries as to whether or not Her Majesty was entitled to the property was directed.

E. T. Malone, for the Attorney-General.

[15TH DECEMBER, 1887.

In re LONDON STEEL WORKS COMPANY. DELANO'S CASE.

Company—Winding-up—Contributory—Variations from prospectus in respect to amount of capital.

D. subscribed for 50 shares in a company to be formed, of which the capital was, according to the prospectus, to be $75,000 in 750 shares of $100. Subsequently the promoters obtained letters patent under R. S. O. c. 150, by which the capital was fixed at double the amount, viz., $150,000 in 1,500 shares of $100. This change was not communicated to D., nor was there any allotment of stock to him; there was no entry of his name in any stock-book, no acting on his part as shareholder; the company was in process of winding-up.

Held, that D. was not liable as a contributory in respect to any shares.

The amount of a company's capital is one of those things which when fixed cannot be varied without the consent of all who join the company. Here there was an important and material variance between the prospectus and the charter of the company, to which D. did not assent, and of which he was not informed till after the winding-up had begun.

Gibbons, for the company.

M. D. Fraser, for the alleged contributory.

[PROUDFOOT, J., 9TH NOVEMBER, 1887.

SMITH v. FAIR.

Trade-mark—Canadian and Imperial Acts—Colour—Seal—Former action—Amount of profits—Necessity for registration—Good-will—Assignment

Actions by the plaintiff, a cigar manufacturer, to restrain the defendant from infringing certain of the plaintiff's trade-marks, amongst others a certain trade-mark consisting of a seal with portions of ribbon attached, and the letters "R. S." forming a monogram above, below, and beside it, and the words "Red Seal"; and also a similar seal, but made of wax or other composition, with portions of ribbon attached, and the letters "R. S." in monogram thereon.

Held, that the above constituted a good trade-mark.

The Canadian Trade-mark and Design Act, 1879, s. 8, defines trade-marks in much more comprehensive terms than the Imperial Statute of 1883, s. 64, and some care must be used in considering decisions in the English Courts.

The word "Red" and the word "Seal" may each be admitted to be *publici juris*, but when combined and applied to a specific manufacture they cease to be so, and can well be protected as trade-marks. Single or more letters may also form a trade-mark, and more especially when combined, woven, or entwined into a monogram.

Under the Imperial Act, s. 67, a trade-mark may be registered in any colour, and the registration confers on the registered owner the exclusive right to use the same in that or any other colour, and our Act should be construed to have as extensive an application.

Held, also, that the fact that the plaintiff had brought a former action against the defendant, which action he had discontinued upon the Court expressing a view that an action could not be brought until he had registered his trade-mark under the 4th section of the Trade-mark and Design Act, 1879, did not prevent him, now that he had registered it, from ascertaining his right under the registration.

Held, also, that the account of profits which the plaintiff was entitled to should not be limited to the date of the registration, although he might not have been able to sue on the

trade-mark till it was registered, though this might admit perhaps of a different consideration if the defendant had infringed the trade-mark innocently, which, however, he had not in this case.

Semble, that it is only where a trade-mark has been infringed innocently that a plaintiff must register before suing.

There is no provision in the Canadian Trade-mark and Design Act, 1879, similar to s. 70 of the Imperial Act of 1883, providing that a trade-mark when registered shall be assigned and transmitted only in connection with the good-will of business concerned in the particular case in which it has been registered.

Held, also, that a plain seal of wax to be used on a cigar box is a good trade-mark within the terms of the statute.

W. R. Meredith, Q.C., and *Talbot Macbeth*, for the plaintiff.

McMichael, Q.C., and *H. M. Wilson*, Q.C., for the defendant.

[18TH NOVEMBER, 1887.

In re GILMOUR AND WHITE.

Vendor and purchaser—Mortgage—Power of sale—Departure from symbolical short form of power—Trustee as assignee—R. S. O. c. 107, s. 3.

A mortgage under the short form of Mortgages Act was made on 24th August, 1874, by E. F. and W. H. F. to T. H. and W. G. T., trustees under the marriage settlement of C. C. H. On 20th October, 1887, R. G. was appointed trustee under the marriage settlement instead of T. H. and W. G. T., and the mortgage and lands were granted and assigned to him to hold under the trusts in the settlement. The mortgage contained a proviso for sale on default of payment for one month *without any notice*. Default was made, and R. G. offered the lands for sale by public auction, and T. L. W. became the purchaser, but objected to the title on the ground that R. G. had no power to sell under the power of sale in the mortgage.

On an application under the Vendor and Purchaser Act, R. S. O. c. 109, s. 3,

Held, that by virtue of R. S. O. c. 107, s. 3, and Imp. Stat. 44 and 45 V. c. 41, s. 31, all the powers, authorities, and discretions contained in the trust deed are to be exerciseable by a new trustee as if he had originally been nominated a trustee by the deed creating the trust; that the original trustees had power to sell; that the new trustee stepped into their place and could exercise all the powers for realizing the trust property that they had, not as an assignee of the estate, but as if appointed a trustee by the deed creating the trust, and that a good title could be made by R. G. to the purchaser.

R. L. Fraser, for the purchaser.

J. Reeve, for the vendor.

[7TH DECEMBER, 1887.

In re COATH AND WRIGHT.

Vendor and purchaser—Mortgage—Power of sale—Notice.

A link in a chain of title was a conveyance made by the mortgagees without notice to the mortgagor, and after requisite default, under a power of sale in a mortgage, which was in the following form "provided that the mortgagees on default of payment for one month may without any notice enter upon and lease or sell the said lands." It was objected by the purchaser that in spite of the terms of the power, notice of sale under the power should have been given to the mortgagor. Upon a petition under the Vendor and Purchaser Act,

D. C. Ross, for the vendor, contended (1) that the power of sale was not operative under the Short Forms' Act relating to mortgages, citing *In re Gilchrist and Island*, 11 O. R. 539; 6 C. L. T. 255. (2). That the agreement of the parties, which provided that no notice need be given, must govern, citing: *Re Gilchrist and Island, supra*, R. S. O. c. 104, s. 3; *Grant* v. *The Canada Life Assurance Company*, 29 Gr. 256; *Leith's* R. P. Statutes, p. 424, note i.; *Fisher* on Mortgages, 4th edition, s. 755; *Armour* on Titles, p. 269.

H. E. Morphy, for the purchaser, contended that notice of sale should have been given.

PROUDFOOT, J., made an order declaring that the conveyance was authorized by the power of sale, and was a due execution thereof.

[FERGUSON, J., 30TH NOVEMBER, 1887.

In re GREEN AND ARTKIN.

Vendor and purchaser—Short Forms of Mortgages Act—Variation in power of sale in mortgage—"Months"—"One month."

G. was assignee of a mortgage made pursuant to the Act respecting Short Forms of Mortgages, R. S. O. c. 104. The words of the short form of power of sale in schedule B. No. 14 are: "Provided that the said mortgagee on default of payment for months," etc.

The mortgage here contained a power of sale in the words "Provided that the said mortgagee on default of payment for *one month*," etc.

In an application under the Vendor and Purchaser Act, the purchaser contended that the substitution of "one month" for "months" was such a variation of the form that G. as assignee could not make title.

Held, that G. could make a good title, and the purchaser must accept it.

Muir, for the vendor.

F. E. Hodgins, for the purchaser.

IN CHAMBERS.

[BOYD, C., 14TH DECEMBER, 1887.

In re ALPHA OIL COMPANY.

Company—Winding-up—Appointment of liquidator—Costs.

Upon a contest for the appointment of liquidator in a winding-up proceeding it is desirable to follow the rules for guidance to be found in the English cases under the winding-

up Acts. The Court abstains from laying down any such rule as that the nominee of the petitioning creditors should have a preference. The Court will consider the condition of affairs to ascertain what parties are most interested in the due administration of the estate in liquidation, and, other things being equal, will act upon their recommendation.

And where upon an application under the Dominion Act, the creditors were those whose interests were most to be regarded, and the great bulk of them favoured the appointment of the sheriff of Lambton, and opposed the nominee of the petitioning creditors, and the sheriff resided in the county where the company's operations were carried on, and where all the books and assets were, and was already *de facto* liquidator under voluntary proceedings taken pursuant to the Ontario Act, and was otherwise well qualified for the position, the Court appointed him liquidator.

The rule as to costs suggested in *Re Northern Assam Tea Company*, L. R. 5 Ch. App. 644, followed.

Arnoldi, for the petitioning creditors.

Hoyles, for the company and certain of the shareholders.

C. J. Holman, for the sheriff and certain of the creditors.

BRITISH CANADIAN LUMBERING AND TIMBER CO. v. GRANT.

Company—Winding-up—Order of foreign Court—Defence—Res judicata.

In the course of proceedings taken in Scotland for winding up the plaintiffs' company, an order was made by a Scotch Court for delivery by the defendant, as one of the officers of the company, of certain books and papers said to be in his hands, and it was provided that in case of default the liquidator might proceed against the defendant, who lived in Ontario, in any Court in Ontario having authority to compel delivery, and upon default this action was brought for that purpose.

Held, that there was and could be no final adjudication of rights by the order, for it could only be operative by enforcing it against the person of the defendant by attachment for

disobedience, and such enforcement could not be of extra-territorial efficacy. There was no power in a winding-up proceeding to pronounce an order equivalent to a final judgment on the merits, based upon service of a person out of the jurisdiction of the Scottish Court.

And an order striking out the defence in the action, on the ground that it was *res judicata* by the order of the Scottish Court, was rescinded.

Semble, that the order should have been limited to such books and papers as were in the hands of the defendant at its date.

W. H. Lockhart Gordon, for the plaintiffs.

Hoyles, for the defendant.

[FERGUSON, J., 25TH NOVEMBER, 1887.

In re SMART, INFANTS.

Infants—Custody—Habeas Corpus—Petition.

A father was proceeding by *habeas corpus* to obtain an order awarding him the custody of his infant children.

Held, that a more comprehensive adjudication could be had upon a petition, and that there was power to direct that a petition should be substituted for the *habeas corpus* proceedings.

Such a direction was given where it appeared to be in the interest of the infants and all concerned.

J. Maclennan, Q.C., and *H. J. Scott*, Q.C., for the father.

S. H. Blake, Q.C., and *H. Cassels*, for the mother.

[MACMAHON, J., 22nd DECEMBER, 1887.

REGINA v. COLLIER.

Canada Temperance Act—Information—Date of offence—Irregularities—R. S. C. c. 178, s. 87—Warrant of commitment.

An information for an offence against the Canada Temperance Act charged that it was committed "within the space of three months last past," and did not state that the Act was in

force in the place where the defendant was alleged to have committed the offence. No objection to the jurisdiction was taken before the police magistrate who tried the defendant; the defendant appeared, submitted to the jurisdiction, was called as a witness for the prosecution, gave evidence as to the offence alleged against him, and was convicted. The conviction showed that the Act was in force where the offence was alleged to have been committed.

Held, that it was no objection to the information that it did not state the particular date of the offence, or that the Act was in force in the place where it was alleged to have been committed; in any case these defects in the information were mere irregularities and were cured by R. S. C. c. 178, s. 87.

Held, also, that it was no objection to a warrant of commitment in default of distress that it was issued prior to the expiration of a warrant of remand, provided that it was issued after the return of the distress warrant.

Held, lastly, that the commitment of the defendant to the gaoler of the common goal of the county in which the defendant was convicted was proper.

Mackenzie, Q. C., for the defendant.

Delamere, for the Magistrate.

[THE MASTER IN CHAMBERS, 14TH DECEMBER, 1887.

MORETTI v. GIANELLI.

Appearance—Time—Judicature Act, Rules 9, 456; Form 1.

This was an action on a promissory note. The writ of summons was served upon the defendant on the 29th November, and judgment was signed by the plaintiff for default of appearance on the 9th December following.

Echlin, for the defendant, moved to set aside the judgment as irregular, contending that he had all of the 9th December to enter the appearance, and referring to Rules 9 and 456.

L. H. Baldwin, for the plaintiff, referred to the language of the writ served, which was according to Form 1, Judicature

Act, and required the defendant to enter his appearance within ten days *inclusive* of the day of service.

THE MASTER IN CHAMBERS—You cannot get over the express words of the body of the writ, which are not really contradictory of the rules referred to. The 8th December was the last day for entering appearance. The motion must be refused.

[16TH DECEMBER, 1887.

In re SOLICITOR.

Attachment of debts—Order for costs only.

The person to receive payment under an order for payment of costs only, is entitled to an order attaching debts due or accruing due to the person to pay.

Any debt existing upon the English cases and the Ontario Judicature Act Rules, is cleared up by R. S. O. c. 66, s. 72.

W. M. Douglas, for the solicitor.

NOVA SCOTIA.

In the Supreme Court.

CORBETT v. ROBINSON.

Absconding debtor—Attachment—Irregularity—Subsequent attachers—Bill in equity to recover proceeds—Appeal—Jurisdiction of Court

The defendant R. on the 5th June, 1880, sued out a writ of summons and attachment against M., under which the sheriff attached certain property of M., which was sold as perishable property. In December following the defendant obtained an *ex parte* order, on default of appearance by M., permitting him to enter judgment against M. for the amount of his debt and costs, and directing the sheriff to pay the amount of the debts and costs out of the proceeds of the sale in his hands.

On 14th January, 1882, the plaintiffs, as subsequent attachers, obtained an order making absolute an order *nisi* previously granted rescinding and quashing the defendant's summons and attachment and all subsequent proceedings, including the order for the payment of the proceeds of the sale, on the grounds that the debt claimed was not due or payable when the action commenced; that the affidavit stated no proper cause of action, and was irregular and defective that the summons was not properly indorsed; that there was no order for the issue of the summons or attachment, and on other grounds.

The defendant having refused to repay the amount received from the sheriff after demand, and the sheriff having declined to commence an action against him to recover the amount, or to allow the plaintiffs to do so in his name, the plaintiffs commenced proceedings by bill in equity praying that an account be taken and that the defendent be ordered to pay the amount realized to the sheriff or to the plaintiffs.

The prayer of the petition having been granted with costs, on the ground that the judgment obtained by the defendant against M. had been set aside and the decision not appealed from or reversed;

Held, that the ground stated was sufficient to support the judgment.

Held, also, that, as all the necessary facts were contained in the order *nisi*, which was made absolute by the order of the 14th January, 1882, the latter order was sufficient, and the jurisdiction of the Court was not only ample but was amply shown.

PROVINCIAL MEDICAL BOARD v. WASHINGTON.

Physicians and surgeons—Registration—Person advertising practice—R. S. (5th series) c. 24., s. 26.

The defendant was prosecuted by the Provincial Medical Board, a body corporate, for an infraction of the provisions of R. S. (5th Series) c. 24, by "professing by public advertisement, card, circular, sign, or otherwise to practise physic or surgery, or give advice therein," the defendant not being at the time properly registered under the Act.

S. 26 reads:

"If any person not registered or licensed under the provisions of this chapter practises physic, or who professes by public card, circular, sign, or otherwise to practise physic or to give advice therein, or in any wise to lead people to infer that he is qualified to practise physic in this province, he shall forfeit and pay the sum of $20.00 for each day that he so practises, or leads people to infer that he is practising."

Held, affirming the decision of the County Court Judge for district No. 1, that the intention of the Act was to prevent persons not registered under it from practising, and that the defendant having professed to practise and give advice, and having actually practised and given advice as a physician and surgeon, although not qualified so to do by registration, was liable to the penalty imposed.

WEATHERBE, J., dissented.

REYNOLDS v. GALLIHAR GOLD MINING CO.

Judgment, setting aside—Contradictory affidavits—Extending time for appearing and pleading.

The plaintiff on the 25th August, 1885, obtained judgment by default against the defendants, a company incorporated in the State of Massachusetts, owning a gold mining property at Isaac's Harbour, in the province of Nova Scotia, the writ of summons having been served upon S., as agent of the company. On the same day an execution was issued, a writ of attachment and summons to agent having been issued on the 7th August preceding. The defendants applied on affidavit to set aside the judgment and execution, etc., and for leave to appear and plead, on the ground that S. had acted in collusion with the plaintiff for the purpose of obtaining the judgment; that the amount for which judgment was entered was not due; that S. never instructed nor informed the executive or managing officers of the defendants that the writ of summons had been issued, or that he had been served with any process in the suit, and the defendants had been kept in ignorance of the proceedings taken against them. The defendants further denied the right of S. to sign certain

promissory notes which formed part of the alleged cause of action. An order having been made at Chambers setting aside the judgment and allowing the defendant to appear and plead,

Held, that as the affidavits were lengthy and contradictory, justice could be done more effectually between the parties after a trial. The order was therefore affirmed.

The time for appearing and pleading having been enlarged by several successive orders granted on hearing affidavits urging the necessity for further time and accounting for delay, which orders were also appealed from,

Held, that, under order 60, rule 5, the Judge at Chambers had power in his discretion to extend the time, even where the application was not made until after the expiration of the time previously appointed or allowed.

FORSYTH v. SUTHERLAND.

Fraudulent conveyance—Creditors—Consideration—Bona fides—Absence of fraudulent intent—Accommodation note.

J. S. was induced to sign an accommodation note in favour of the plaintiffs on the plaintiffs' undertaking that he would never be called upon for payment. Two days later, in fulfilment of an understanding which had existed long previously, J. S. executed a deed of real estate, being the only property he possessed, to his two daughters, the defendants, "in consideration of natural love and affection, and as a provision for the maintenance of himself and wife, and in further consideration of one dollar." At the time of the execution of the deed, as an additional consideration, the defendants agreed to pay and subsequently did pay a debt which J. S. owed to one B. The plaintiffs having recovered judgment against J. S. on the note, sought to have the deed to the daughters set aside as made fraudulently and with intent to defeat, defraud, and delay creditors, and to have the defendants declared trustees for the plaintiffs and other creditors. A bill in equity filed for this purpose having been dismissed, the plaintiffs appealed.

It appearing that the deed attacked was made for valuable consideration and *bona fide*, and without any fraudulent intent,

Held, that the appeal must be dismissed.

DURKEE v. FLINT.

Assignments—Bills of sale—Requirements as to filing and affidavits—Construction of Acts of 1880, c. 2, s 1; R. S. (5th series) c. 92, s. 4.

W. McG., O. McG., and N. L., of Yarmouth, traders, by separate deeds of assignment, (A. B. and C.) assigned to plaintiff all their real and personal estate in trust for creditors. The assignment A. was made for the general benefit of creditors, and the assignments B. and C. for the benefit of certain preferred creditors, the residue only, if any, being assigned for the benefit of general creditors. Bearing even date with the assignments the assignors executed separate bills of sale of their respective personal property, (D. E. and F.) to the plaintiff subject to the trusts contained in the deeds of assignment.

None of the deeds of assignment was filed with the Registrar of Deeds at Yarmouth. The bills of sale were filed, but were not accompanied with affidavits under the Acts of 1880, c. 2., s. 1; R. S. (5th Series) c. 92, s. 4. The defendant, as sheriff of the County of Yarmouth, having levied on the property included in the bills of sale and assignments, under executions placed in his hands by judgment creditors,

Held, affirming the judgment of THOMPSON, J., WEATHERBE, J., dissenting, that the assignments referred to in the bills of sale E. and F. setting out the considerations and trusts on which they were made not being of the character of defeasances, and it sufficiently appearing that no interest remained in the grantors, and that the sales and assignments were made for the benefit of creditors, were not required to be filed as part of the instruments of transfer.

Per THOMPSON, J., in the judgment affirmed:

1. That neither the bills of sale nor assignments required to be accompanied with the affidavit provided for in the Acts of 1880, c. 2, s. 1, that enactment only applying to bills of sale for securing debts or advances.

2. That the assignment A. did not require to be filed, as it was an assignment for the general benefit of creditors. The assignments B. and C. were liable to be defeated by execution creditors for want of filing.

3. That the assignments B. and C., not being in the nature of defeasances, which are required to be filed, and the bills of sale E. and F., being absolute conveyances, and fully expressing all that was material to their character as such, the provisions of the Act in reference to filing were substantially complied with, and the sheriff was not justified in levying upon or selling any part of the property included in the assignment A. or the bills of sale E. and F.

4. The assignment A. was good without filing, and D. was only auxiliary to A.

NEW BRUNSWICK.

In the Supreme Court.

COATES v. TOWN OF MONCTON.

Municipal taxation—Employees of Federal Government—Assessment on income—Principles governing.

Persons in the employ of the Intercolonial Railway department at Moncton were divided into five classes :

1. Members of the Civil Service of the Dominion, under the Civil Service Act of 1882, who received a yearly salary, and contributed to the superannuation fund of the Civil Service.

2. Persons who received a yearly salary, but were not appointed to the Civil Service as provided by the Act of 1882, but held an office created by a Dominion Statute, or were appointed by the Governor-General under authority of a Statute, and who did not contribute to the superannuation fund.

3. Persons paid monthly, at a certain rate per year, and liable to be dismissed at any time, who were not appointed under the Civil Service Act, nor as mentioned in class 2, and did not contribute to the superannuation fund.

4. Engine-drivers and conductors, employed in running trains, and paid by the mileage run, who received their pay monthly, and who were subject to dismissal at any time.

5. Carpenters and other mechanics and workmen, who were paid monthly, according to the time employed, and were subject to dismissal in the same manner as class 4.

Held, 1. Per *tot. curiam*, that the persons in classes 1 and 2 were not liable to be assessed for municipal purposes on their incomes received from the Government; following *Ackman* v. *Town of Moncton*, 24 N. B. Rep. 103.

2. *Per* Allen, C. J., Wetmore, King, and Fraser, JJ. (Palmer, J., dissenting) that the persons belonging to the third class were also exempt.

3. Per Wetmore, King, and Fraser, JJ. (Allen, C. J., and Palmer, J., dissenting) that the fourth and fifth classes were also exempt: over-ruling *Landry* v. *Town of Moncton*, 24 N. B. Rep. 103.

HALIFAX BANKING v. SMITH.

Affidavit to hold to bail made by an agent—Statement of means of knowledge—Negativing intention to vex and harass defendant—Waiver—Appointment of commissioner to take affidavits—Presumption of appointment.

An affidavit to arrest a debtor, made by the managing agent in this province of a foreign banking corporation, stated that he was such agent, that the defendant was indebted to the company in a certain amount, and that the arrest was not made by himself, nor by the company, for the purpose of vexing or harassing the defendant.

Held, 1. That it was not necessary that the agent should state his means of knowing the existence of the debt. 2. That, without stating that the suit was brought by his direction, the affidavit did not sufficiently negative that the arrest was made for the purpose of vexing and harassing the debtor, as required by Consol. Statutes c. 38.

The omission to make such a statement in the affidavit is an irregularity only, and is waived by putting in special bail, if the bail might have known of the irregularity by examining the affidavit in the clerk's office.

Where an affidavit purported to have been sworn before a commissioner for taking affidavits ;

Held, WETMORE, J., dissenting, that it would be presumed that he had been appointed a commissioner unless the contrary was clearly shewn.

Per WETMORE, J., that where the application made by the bail to set aside the proceedings raised a doubt as to the authority of the person to take affidavits, the *onus* was on the plaintiff to prove his authority ; and in the absence of such proof, the affidavit was a nullity, and the objection was not waived by entering special bail.

In re BROWN.

County Courts—Practice—Change of venue—Non-resident plaintiff—Appeal —Certiorari.

Where the plaintiff in an action in the County Court resides out of the Province, and the defendant applies to change the venue, the plaintiff, on opposing such application, may shew that the cause can be more conveniently tried in the county in which he had laid it ; and if he omits to do so, and an order is made to change the venue, he cannot afterwards make a separate application to bring it back to the original county.

Quære, whether an appeal will lie under the County Court Act, s. 51, from the order of a Judge to change the venue.

MOORE v. SHARKEY.

Municipal corporation—Police Magistrate—Service of summons—By-law against standing on seats in Public Hall—Conviction—Recovery of penalty.

In a prosecution before the Police Magistrate of Fredericton, in which the defendant did not appear, proof by a policeman that he had served a copy of the summons on the defendant personally, and that the defendant resided in Fredericton, was *held* sufficient.

In a proceeding of review under the Consol. Statutes, c. 62, s. 38, it will be inferred that such summons was served in Fredericton, there being no affidavit of the defendant that he had not had a reasonable opportunity of appearing.

A by-law of the city of Fredericton prohibited persons from "clambering over, or stepping over, or standing up on the seats" in the city hall. A conviction for "clambering over and stepping on" the seats is not sustained by evidence that the defendant, being seated in the hall, stepped over the back of the seat in front of him, and upon that seat, but did not remain standing there.

Stepping over a seat is not "clambering over;" nor does the mere stepping on a seat, while in the act of moving from one seat to another, come within the words of the by-law "standing up on a seat."

The Act 22 V. c. 8, s. 85, gave the Mayor of Fredericton power to sue for all fines, etc., imposed by any by-law made under the authority of the Act, and in default of payment to recover such fines, etc., by distress, or by imprisonment, as he might direct. The Act 34 V. c. 1, authorizing the appointment of a Police Magistrate for Fredericton, having taken away the power of the Mayor to recover fines, etc., and vested all such powers in the Police Magistrate,

Held, that he had power to enforce the payment of a fine for breach of a by-law, by imprisonment of the defendant in the same manner that the Mayor could have done under the Act 22 V. c. 8.

The by-law against clambering over seats, etc., in the city hall, is within the power of the corporation under the Act 22 V. c. 8, s. 54.

ISAACS v. FERGUSON.

Landlord and tenant--Holding over—Implied terms—Parol lease for one year—Statute of Frauds—Entry of lessee—Use and occupation.

Where a tenant continues in possession after the expiration of his lease with the assent of his landlord, it will be presumed, in the absence of an express agreement, that the rent and terms of payment are the same as before.

A parol lease for one year is valid, being within the exception of the Statute of Frauds, Consol. Statutes c. 76, s. 7; and the lessor may bring an action for the rent, though the lessee has not entered.

Semble, that an action for use and occupation will not lie unless the lessee has entered.

MANITOBA.

IN THE QUEEN'S BENCH.

[FULL COURT.

JUKES v. WINNIPEG AND HUDSON'S BAY R. W. CO.

Company—Judgment debtor—Examination of officer—Production of books of company—Costs.

Upon an application to examine an officer of a judgment debtor corporation, there should be distinct evidence that the person named is an officer of the corporation, and as to what office he holds.

No order can be made that an officer do produce the books etc. of the corporation.

No order can be made directing that the costs of the application and examination be added to the plaintiff's debt.

CULLIN v. RINN.

Covenant of indemnity—Action on before payment by covenantee.

A., the owner of land subject to two mortgages, conveyed to B., subject to the mortgages, and B. covenanted "to pay off and discharge the above recited mortgages and interest as the same shall become due, and forever save harmless the said party of the second part from any loss, costs, or expenses connected therewith."

Held, that an action might be brought upon this covenant, and the amount due upon the mortgages recovered before payment of any part of them by the covenantee.

CANADIAN PACIFIC R. W. CO. v. CALGARRY.

Tax sale—Injunction—Appeal to Court of Revision.

An injunction may be granted to restrain a tax sale. The limits of such jurisdiction discussed.

It is not necessary that a claim of exemption from taxation should be raised before the Court of Revision; and the party wrongly assessed is not estopped by not taking that step.

This was an appeal from the North-West Territories from a judgment allowing a demurrer to a claim for an injunction to restrain the sale of the plaintiffs' lands for taxes. Much of the judgments relating to the right of appeal etc., are not reported, the appellate power of the Manitoba Court being now altogether abolished. The judgments upon the two points mentioned above discuss law applicable to this province.

BRITTLEBANK v. GRAY-JONES.

Married woman—Separate estate—43 V. c. 25, ss. 57-62 (D.)

Certain moneys were settled to the separate use of a married woman, subject to her power of appointment. She appointed to her own use, received the moneys, and with them purchased certain cattle and farm stock; which with her assent were used by her husband upon a farm. In an interpleader issue between the married woman and the execution creditors of the husband;

Held, that the goods belonged to the husband by virtue of the marriage, notwithstanding the provisions of 43 V. c. 25, ss. 57-62, (D.)

2. That the husband was not a trustee for the wife, there being no evidence of his acting in that capacity.

BALFOUR v. DRUMMOND.

Costs—Separate defences.

Held, 1. That no general rule can be laid down upon the question as to the taxation of separate bills of cost to defendants appearing by separate solicitors.

2. At the present day the Court is much more inclined than formerly to insist upon parties having the same or a common interest joining in their defences.

3. The rule as to joining in defences is not limited to the cases of trustee and *cestui que trust*, mortgagor and mortgagee, assignor and assignee.

4. Residences widely separated may be a reason for answering separately, but not for representation by separate counsel.

5. The question may be raised as well upon taxation under interlocutory orders as after decree.

A number of persons joined together and purchased property in the name of a trustee, who executed to the plaintiff a mortgage upon it to secure money borrowed. Some of the purchasers joined in a bond to the mortgagee to secure the repayment. In a suit for sale under the mortgage and for a personal order against the bondsmen, an order was made postponing the hearing and ordering the plaintiff to pay to the defendants the costs of the day. Under this order the taxing officer gave one bill of costs to A., B., and C., three defendants who had not signed the bond; one bill to D. and E., who had executed the bond; and no bill at all to F., an assignee of one of the purchasers against whom no relief was prayed, other than the sale, and who had answered consenting to a sale.

Held, affirming the decision of DUBUC, J., that the officer had exercised a proper discretion as to A., B., C., D., and E; that as to F., the order having directed his costs to be paid, he should have a bill taxed to him, but as he should not have answered or appeared, it should be the smallest possible.

ABELL v. ALLAN.

Attachment of debts—Garnishing order—Right of attaching creditor to enforce judgment recovered by debtor against garnishee.

Held, affirming the decision of KILLAM, J., that the service of an attaching order binds the debt due by the garnishee, but does not transfer to the plaintiff the securities held for the debt, or give any right to take advantage of the position of the debtor in respect of such securites.

An execution creditor cannot under a *fi. fa.* lands sell the charge which the judgment debtor may have upon the lands of a third party by virtue of a registered judgment.

If the interest which a judgment debtor might acquire in such lands by docketing his judgment under the English statutes, could be sold under execution, it would only be after such lands had been "delivered in execution by virtue of a writ."

SINCLAIR v. MULLIGAN.

Constitutional law—Laws in force in Assiniboia.

The laws of England, as they existed at the date of the charter of the Hudson's Bay Co., so far as applicable, formed the body of laws in force in this territory up to the Assiniboia Ordinance of 11th April, 1862.

Per TAYLOR, C.J., affirming the decision of KILLAM, J. The ordinances of 11th April, 1862, and 7th January, 1864, were limited to regulating the proceedings of the Court, and did not introduce the general laws of England, DUBUC, J., *dubitante*.

Per TAYLOR, C. J.—Persons entitled under the H. B. Co. to estates less than estates in fee simple, are entitled to have such titles confirmed, but are not as of right entitled to a grant from the Crown of a larger estate.

[TAYLOR, C. J.

POLSON v. BURKE.

Costs—Withdrawal of record—Discontinuance.

At the trial, after the case was called, but before it was opened, the plaintiff withdrew the record and immediately afterwards took out a rule to discontinue.

Held, that the defendant was entitled to tax the costs of preparing for trial and fees paid to counsel.

A fee to one counsel of $40 was allowed.

COCHRANE v. McFARLANE.

Interpleader—Sheriff's costs where claimant abandons.

A person served a notice upon a sheriff claiming goods seized under a writ against another. Upon the return of an interpleader summons the claimant appeared, obtained two enlargements, and doing nothing to substantiate his claim, was barred.

Held, that the claimant should pay the sheriff's costs.

FAIRBANKS v. DOUGLAS.

Injunction to restrain assumption of municipal office.

A court of equity will not upon an injunction bill try the validity of an election to the office of mayor or councillor; even though the custody of the books and papers of the municipality be in question, at all events not unless there are others claiming the right to hold the offices.

The bill in this case alleged the holding of an election in the town of Emerson for the election of mayor and certain councillors; that the defendant Douglas was a candidate for the mayoralty and the defendant Macdonald for the office of councilman for Ward 3; that no poll was held on the proper day in Ward 3; that upon a subsequent day a poll was improvised and the defendants declared elected; that

the other five councillors had assumed under s. 206 of the Municipal Act to appoint the defendants to the same offices, respectively: that the defendants and the other councillors now assumed to act as mayor and council, had assumed to discharge the plaintiff from the office of clerk and treasurer which he theretofore held, and still claimed to hold, had appointed another person to fill those offices, and now threatened to open the vault and take possession of the books and papers of the municipality. The bill prayed an injunction restraining the defendants from further sitting and serving as mayor and councillor and from in any way interfering in the business or with the books, records, etc., of the town.

The plaintiff moved for an interim injunction in terms of the prayer of the bill, which the court refused.

[DUBUC, J.

REGINA v. MORGAN.

Criminal law—Conviction—Statutory exceptions not negatived.

A statute declared certain acts committed by "any person not legally empowered . . . without the owner's permission," to be unlawful.

A conviction stating the acts done, but not negativing power and permission, was *held* bad.

McLELLAN v. MUNICIPALITY OF ASSINIBOIA.

Particulars of residence, etc., of plaintiff's husband.

Application by the defendants for the particulars of the residence, etc., of the husband of the plaintiff.

Howden, shewed cause.

L. S. McPhillips, contra, referred to *Johnson* v. *Birley*, 5 B. Ald. 540; *Glynn* v. *Kirby*, 1 Str. 402; *Marshall* v. *Ruttan*, 8 L. R. 546.

DUBUC, J., after reserving judgment, made the order as asked.

MOORE v. PROTESTANT SCHOOL DISTRICT OF BRADLEY, No. 369.

Amendment of defendant's name after decree—Mechanic's lien against school house—Costs.

The plaintiff filed a mechanic's lien against lands of "the School Trustees for the Protestant School District of Bradley No. 369, in the Province of Manitoba;" and filed a bill upon such lien against the corporation, using the name above set out. The bill was taken *pro confesso*. After decree and sale a petition was filed by the plaintiff to amend the style of cause throughout.

Held, 1. That the amendment should be allowed.

2. That the land, including a public school erected upon it, was liable to charge and sale under a mechanic's lien.

3. That the plaintiff should pay the costs of the petition.

[KILLAM, J.

BARR v. CLARK.

County Court—Appeal from order.

No appeal will lie from an order of a County Court Judge directing the Clerk to sign a judgment which, without such order, he should have signed.

JENKINS v. RYAN.

Costs—Injunction motion.

Pending a motion for injunction, the plaintiff took out a *præcipe* order to dismiss his bill.

Held, that the defendant's costs of the injunction motion were properly taxable under this order.

Supreme Court of Canada.

EXCHEQUER COURT.]

REGINA v. FARWELL.

Constitutional law—Crown grant—Provincial or Dominion lands— Canadian Pacific Railway—47 V. c. 14 (B. C.)

By provision 11 of the Order in Council admitting the Province of British Columbia into Confederation British Columbia agreed to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, in furtherance of the construction of the Canadian Pacific Railway, an extent of public lands along the line of railway. After certain negotiations between the Governments of Canada and British Columbia, and in order to settle all disputes, an agreement was entered into, and on the 19th December, 1883, the Legislature of British Columbia passed the statute 47 V. c. 14, by which it was enacted *inter alia* as follows :—"From and after the passing of this Act there shall be, and there is hereby, granted to the Dominion Government for the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of railway before mentioned, wherever it may be finally located, to a width of twenty miles on each side of said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into confederation. On the 20th November, 1883, by public notice, the Government of British Columbia reserved a belt of land of twenty miles in width along a line by way of Bow River Pass. In November, 1884, F., to comply with the provisions of the Provincial Statutes, filed a survey of a certain parcel of land situate within the said belt of twenty miles, and the survey having been finally accepted on the 13th January, 1885, Letters Patent under the Great Seal of the Province were issued to F. for the land in question.

The Attorney-General of Canada, by information of intrusion, sought to recover possession of said land, and the

Exchequer Court, having dismissed the information with costs, on appeal to the Supreme Court of Canada, it was

Held, reversing the judgment of the Exchequer Court, HENRY, J., dissenting, that at the date of the grant the Province of British Columbia had ceased to have any interest in the land covered thereby, and that the title to the same was in the Crown for the use and benefit of Canada.

Per STRONG, J., that the appellant should be ordered if insisted upon by the respondent, to file the affidavit of the Chief Engineer of the Canadian Pacific Railway, to prove that at the date of the grant, the line of the Canadian Pacific had been located within twenty miles of the land in question.

J. S. D. Thompson, Attorney-General of Canada, *Burbidge*, Q.C., and *Hogg*, for the appellant.

Theodore Davie, Q.C., for the respondent.

THE ATTORNEY-GENERAL OF BRITISH COLUMBIA v. THE ATTORNEY-GENERAL OF CANADA.

Constitutional law—B. N. A. Act, s. 146—47 V. c. 14, s. 2 (B. C.)—Provincial public lands, transfer of to Dominion of Canada—Precious metals vested in the Crown in right of the Dominion Government.

By provision 11 of the Order in Council passed in virtue of s. 146 of the B. N. A. Act, under which British Columbia was admitted into the union it was provided as follows:—

"And the Government of British Columbia agree to convey to the Dominion Government, in trust, to be appropriated in such manner as the Dominion Government may deem advisable, in furtherance of the construction of the said railway, a similar extent of public lands along the line of railway throughout its entire length in British Columbia, not to exceed, however, twenty miles on each side of the said line, as may be appropriated for the same purpose by the Dominion Government from the public lands of the North-west Territories and the Province of Manitoba."

By 47 V. c. 14, s. 2 (B. C.) it was enacted as follows:—"From and after the passing of this Act there shall be, and there is hereby granted to the Dominion Government, for

the purpose of constructing and to aid in the construction of the portion of the Canadian Pacific Railway on the mainland of British Columbia, in trust, to be appropriated as the Dominion Government may deem advisable, the public lands along the line of the railway before mentioned, wherever it may be finally located to a width of twenty miles on each side of the said line, as provided in the Order in Council, section 11, admitting the Province of British Columbia into confederation."

A controversy having arisen in respect of the ownership of the precious metals in and under the lands so conveyed, the Exchequer Court, upon consent and without argument, gave judgment in favour of the Dominion Government.

On appeal to the Supreme Court:

Held, affirming the judgment of the Exchequer Court, FOURNIER and HENRY, JJ., dissenting, that under the Order in Council admitting British Columbia into confederation and the statutes transferring the public lands described therein, the precious metal in and under such public lands are now vested in the Crown as represented by the Dominion Government.

McCarthy, Q.C., for the appellant.

Burbidge, Q.C., and *Hogg*, for the respondent.

ONTARIO.]

MILLER v. CONFEDERATION LIFE ASSOCIATION.

Insurance—Life—Application for policy—Declaration by assured—Basis of contract—Warranty—Misdirection.

An application for a life insurance policy contained the following declaration after the applicant's answers to the questions submitted;—

"I, the said George Miller, (the person whose life is to be insured) do hereby warrant and guarantee that the answers given to the above questions (all which questions I hereby declare that I have read or heard read) are true, to the best of my knowledge and belief; and I do hereby agree that this proposal shall be the basis of the contract between me and the said association, and I further agree that any mis-statements or suppression of facts made in the answers to the

questions aforesaid, or in my answers to be given to the medical examiner, shall render null and void the policy of insurance herein applied for, and forfeit all payments made thereon. It is also further agreed that should a policy be executed under this application, the same shall not be delivered or binding on the association, until the first premium thereon shall be paid to a duly authorized agent of the association, during my life time and good health. I, (the party in whose favour the assurance is granted), do also hereby agree that this proposal and declaration shall be the basis of the contract between me and the said association."

Held, affirming the judgment of the Court below, 14 A. R. 218; 7 C. L. T. Occ. N. 187, that this was not a warranty of the absolute truth of the answers of the applicant, but that the whole declaration was qualified by the words "to the best of my knowledge and belief"; and though some of the answers were untrue in fact, the policy was not thereby avoided unless they were wilfully untrue.

At the trial the jury were charged that if there was wilful misrepresentation, or such as to mislead the company, they should find for the defendants, but that if the answers were reasonably fair and truthful to the best of the knowledge and belief of the applicant their verdict should be for the plaintiffs.

Held, a proper direction.

S. H. Blake, Q.C., and *Beaty*, Q.C., for the appellants.

McMichael, Q.C., and *McCarthy*, Q.C., for the respondents.

GEMMILL v. GARLAND.

Copyright—Infringement—Notice of entry—Variation from statutory form.

A copyrighted work called "The Canadian Parliamentary Companion" contained biographical sketches of members of Parliament and others, which the author had procured from the subjects for the purpose of his book. G., in preparing a similar work to be called "The Parliamentary Directory and Statistical Guide," sent circulars to a number of public men asking for short biographical sketches, and was by many of them referred to the first mentioned work, and took such sketches therefrom.

Held, that this was an infringement by G. of the copyright in "The Canadian Parliamentary Companion," and G. was properly enjoined from publishing or selling the books containg such extracted matter.

By 38 V. c. 88, s. 9, a notice must be inserted in the title page or page following of every copy of a book copyrighted thereunder in the form following "Entered according to the Act of the Parliament of Canada in the year by A. B. in the office of the Minister of Agriculture."

Held, that the omission of the words "of Canada" in such form did not avoid the copyright, but was a sufficient compliance with the Act.

Held, also, that depositing copies of a book containing the notice in the office of the Minister of Agriculture before the copyright has been obtained does not invalidate it after it has been granted.

The judgment of the Court below, 7 C. L. T. Occ. N. 306, affirmed.

W. Cassels, Q. C., and *W. H. Walker*, for the appellant.

Arnoldi, for the respondent.

SUTHERLAND v. COX.

Principal and agent — Speculating in stocks — Instructions to broker— Broker's duty—Money paid for margins

S., a speculator in stocks, instructed F., a stock broker, to purchase for him a certain number of shares in F. B. stock, expecting to make a profit out of a rise in the value of the stock in the market.

Held, affirming the judgment of the Court below, 13 A. R. 525; 7 C. L. T. Occ. N. 150, that the relation between S. & F. was that of principal and agent, and F. was bound to purchase the stock and hold it as the property of S. He could not rely on his ability to procure a like number of shares when required, as his interest would then be to depreciate their value so as to obtain them cheaply, which would conflict with his duty to S.

F. being about to retire from business as a stock broker, handed over his stock transactions, including that with S., to C., to which S. consented. C. acknowledged to S. having

received from F. the amount paid for margins on the stock which F. was instructed to buy. Neither F. nor C. having purchased the stock and set it apart as the property of S.,

Held, affirming the judgment of the Court below, that C. was liable, in an action for money had and received, to refund to S. the amount so paid for margins.

W. Cassels, Q.C., and *R. G. Cox*, for the appellants.

D. E. Thomson, for the respondents.

QUEBEC.]

MACKINNON v. KEROACK.

Capias—Petition to be discharged—Judgment on—Final judgment and appealable under R. S. C. c. 135, s. 28—Fraudulent preference—Secretion—Promissory note discounted

A writ of capias having been issued against McK. under the provisions of art. 798 of C. C. P. (P. Q.), he petitioned to be discharged under art. 819, C. C. P., and issue having been joined on the pleadings under art. 820, C. C. P., the petition was dismissed by the Superior Court. From that judgment McK. appealed to the Court of Queen's Bench for Lower Canada (Appeal side), and that Court maintained the judgment of the Superior Court. Thereupon McK. appealed to the Supreme Court of Canada.

On motion to quash for want of jurisdiction,

Held, TASCHEREAU, J., dissenting, that the judgment was a final judgment in a judicial proceeding within the meaning of R. S. C. c. 135, s. 28, and therefore appealable.

On the merits it was

Held, per RITCHIE, C.J., FOURNIER and TASCHEREAU, JJ., that a fraudulent preference to one or more creditors is a "secretion" within the meaning of art. 798, C. C. P.

Also, that an indorser of a note discounted by a bank has the right under art. 1953, C. C., to avail himself of the remedy provided by art. 798, C. C. P., if the maker fraudulently disposes of his property.

STRONG, HENRY, and GWYNNE, JJ., contra.

Gault v. *Dussault*, 4 Leg. News 421, approved of.

The Court being equally divided the appeal was dismissed without costs.

McMaster, Q.C., and *Hutchinson*, for the appellant.

Geoffrion, Q.C., and *Greenshields*, for the respondent.

BEAUDET v. NORTH SHORE R. W. CO.

Award—Validity of—43 & 44 V. c. 43, s. 9 (P. Q.)—Faits and articles—Art. 225, C. C. P.

E. B. and others, joint owners of land situate in the city of Quebec, were awarded $11,900 under 43 and 44 V. c. 43, s. 9, for a portion of their land expropriated for the use of the North Shore Railway Company.

On the 12th March, 1885, E. B. and the others instituted an action against the company based on the award. The company not having pleaded, foreclosure was granted, and on 21st April process for interrogatories upon *faits* and *articles* was issued and returned on the 26th April. The company made default. On 18th June the *faits* and *articles* were declared taken *pro confessis*. On 16th May E. B. *et al.* consented that the defendants be allowed to plead, but it was only on the 7th July that a plea was filed, alleging that the arbitration had been irregular and was against the weight of evidence. On 2nd September E. B. *et al.* inscribed the case for hearing on the merits, on which day the railway company moved to be authorized to answer the *faits* and *articles*, and the motion was refused. The notice of expropriation and the award both described the land expropriated as No. 1 on the plan of the railway company deposited according to law, but another part of the notice described it as forming part of a cadastral lot 2345 and in the award as forming part of lots 2344, 2345. On the 5th December judgment was rendered in favour of E. B. *et al.* for the amount of the award. From this judgment the railway company appealed to the Court of Queen's Bench (Appeal aside), and that Court reversed the judgment of the Superior Court, holding *inter alia* the award bad for uncertainty, and that the case should also be sent back to the Superior Court to allow the defendants to answer the *faits* and *articles*.

On appeal to the Supreme Court of Canada, it was

Held, 1. That there was no uncertainty in the award, as the words of the award and notice were sufficient of themselves to describe the property intended to be expropriated and which was valued by the arbitrators.

2. That the motion for leave to answer *faits* and *articles* was properly refused; TASCHEREAU, J., dissenting.

Duhamel, Q.C., for the appellants.
Bedard, for the respondents.

TRUDEL v. NORTH SHORE R. W. CO.

Sale of land—Delivery to agent—Pleading.

S. T. brought an action to recover $3,200 as the balance of the purchase money of certain land in Quebec, sold by him to the North Shore R. W. Co. To this action the defendants pleaded by temporary exception that out of 3307 superficial feet sold to them, S. T. never delivered 710 feet, and that so long as the full quantity purchased was not delivered they were not bound to pay. To this plea S. T. replied specially that he delivered all the land sold to P. B. V., the agent of the company, with their assent and approbation, together with other land sold to P. B. V. at the same time. At the trial it was shown that P. B. V. had purchased all the land owned by S. T. in that locality, but exacted two deeds of sale, one of 3307 feet for the railway company, and another of the balance of the property for himself. By the deed to P. B. V. his land was bounded by that previously sold to the company. P. B. V. took possession and the railway company fenced in what they required.

Held, affirming the judgment of the Court below, that S. T. having delivered to P. B. V., the agent of the company, with their assent and approbation, the whole of the land sold to them, together with other land sold to the said P. B. V. at the same time, he was entitled to the balance of the purchase money.

Per TASCHEREAU, J., that all the appellants could claim was a diminution of price or a resiliation of the sale under articles 1501, 1502, and that therefore their plea was bad.

Duhamel, Q.C., for the appellants.
Bedard, for the respondent.

NOVA SCOTIA.]

SHELBURNE ELECTION CASE.

ROBERTSON v. LAURIE.

Elections—Petition—Service of copy—Extension of time—Discretion of Judge—R. S. C. c. 9, s. 10.

Held, that an order extending time for service of the notice of the presentation of an election petition with a copy of the petition from five days to fifteen days by a Judge in Nova Scotia, on the ground that the respondent was at the time at Ottawa, is a proper order for the judge to make in the exercise of his discretion under R. S. C. c. 9, s. 10.

R. W. Scott, Q.C., for the appellant.

Graham, Q.C., for the respondent.

PRINCE EDWARD ISLAND.]

PRINCE COUNTY ELECTION CASE.

HACKETT v. PERRY.

Legislative Assembly—Disqualification—Enjoying and holding an interest under a contract with the Crown—39 V. c. 3, ss. 4 & 8 (P. E. I.)

The return of S. P. as member elect for the House of Commons for the electoral district of Prince County, P.E.I., was contested on the ground that S. P. being a member of the Provincial House of Assembly, he was not eligible as a member of the House of Commons. At the trial it was admitted that S. P. had been elected to the Provincial House of Assembly at the general election in June, 1886, and that there had been no meeting of the Local House at the date of the general election for the Dominion House. S. P., prior to his nomination, gave to two members of the House of Assembly a written resignation of his seat, and at the time of the general election for the House of Commons he had acquired for value and was holding a share in a ferry contract with the local government subsidized to the extent of $95 per annum.

The Judge at the trial held that S. P. had not properly resigned his seat, as the Island Statute 39 V. c. 3, had not

provided for the resignation of a member in the interval between the dissolution of one general assembly and the first session of the next general assembly, but that his seat had become vacant under the provisions of the 4th section of the Provincial Act 39 V. c. 3 (P. E. I.)

On appeal to the Supreme Court of Canada,

Held, affirming the judgment of the Court below, TASCHEREAU, J., dissenting, that S. P. enjoyed and held such an interest in a public contract as rendered his seat vacant in the local house of assembly (P. E. I.) under sections 4 & 8, of 39 V. c. 3 (P. E. I.) and therefore that he was properly eligible for election to the House of Commons.

Hodgson, Q.C., for the appellant.

Peters, for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

BOYD, C.] [11TH MAY, 1887.

CITY OF TORONTO v. TORONTO STREET RAILWAY CO.

Appeal—Injunction—Staying operation of—R. S. O. c. 38, s. 27.

Held, that the operation of an injunction awarded by a judgment of the Court below was stayed pending an appeal to this Court, after the perfecting of the security on appeal, by virtue of R. S. O. c. 38, s. 27.

McCarthy, Q.C., for the appellants.

Robinson, Q.C., for the respondents

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 24TH DECEMBER, 1887.

GORDON v. THE CITY OF BELLEVILLE.

Municipal corporation—Liability for injury caused by ice on sidewalk—Knowledge—Contributory negligence.

The plaintiff, a resident of Belleville, in going to and from the main part of the city to and from his residence, usually used a part of Queen Street west of George Street, and which was bounded on the west by the school lot, forming a *cul de sac*. Foot passengers were in the habit of walking through the school lot as a short cut, and going, they would come unto and walk over the portion of Queen Street.

The municipality had laid down a plank sidewalk, about five feet wide, on the south side of Queen Street, from the west side of George Street to the school lot. Overhanging about half of this walk was the projecting eave or roof of a cottage, the drippings from which formed a ridge of ice on the centre of the walk. The plaintiff knew the walk was dangerous—he passed and saw it every day—that portion of the street was not used for vehicles, and there was a travelled path through the snow to the north of the sidewalk. The plaintiff, going home on a moonlight night, used the sidewalk, slipped, fell, and injured his arm. The defendants contended he should have been non-suited, because he shewed himself to have been guilty of contributory negligence.

Held, that the plaintiff having the right to use the sidewalk, it was a question for the jury whether, under the circumstances, he was exercising reasonable care, and that mere knowledge does not constitute contributory negligence.

Burdett, for the plaintiff.

Dickson, Q.C., and *Osler*, Q.C., for the defendants.

O'CONNOR v. KENNEDY.

Marriage—Banns—License—Evidence—Bastardizing issue—26 Geo. II., c. 33— C. S. U. C. c. 102, s. 103—37 V. c. 6, s. 1—Legal presumption in favour of marriage.

In ejectment it appeared that M., one of the defendants, was married to N., 7th February, 1866, on one calling of

banns, a dispensation having been procured from the Roman Catholic Archbishop for the other two calls, both parties belonging to that faith. Both husband and wife had immediate possession of the land in question under deed to him. Of this marriage was born, 20th February, 1867, an only daughter. N. died 3rd May, 1868, and his widow M., on the 11th October, 1870, intermarried with the defendant K., and they continued in uninterrupted possession until issue of writ herein. On 11th January, 1886, the daughter of M. & N. intermarried with the plaintiff, to whom was born, in wedlock, 3rd July, 1886, though conceived before, the infant plaintiff, the mother dying on the following day. On the issue of the writ herein by the plaintiff and his infant daughter against M. and her husband, the defendant K., they claimed title by possession, and denied the validity of the marriage between M. and N., on the ground of the non-publication of the banns.

Held, (1) That the onus of disproving the marriage was on the defendants. (2) That 26 Geo. II. c. 33 was in force in Canada as to publication of banns. (3) That 37 V. c. 6, s. 1, remedied any defect in the marriage. (4) That the invalidity was not established, inasmuch as the defendants did not prove that no license had been issued for this marriage, so as to overcome the legal presumption in favour of marriage.

J. Maclennan, Q.C., and *Kean*, for the defendants.

Lennox and *McCosh*, for the plaintiffs.

In re BOYLAN AND THE CITY OF TORONTO.

Municipal corporation—By-law limiting number of tavern licenses—License Commissioners.

Held, (1) That the council of the corporation of the city of Toronto has the power, under R. S. O. c. 181, s. 17, to pass a by-law limiting the number of tavern licenses, and that power is not interfered with or diminished by the law, 39 V. c. 26, granting limiting powers to the board of license commissioners.

2. That though the by-law contained on its face no description of the local limits of its operation, the fact that it was passed by the council of the city, and could have had no

operation elsewhere than in the city, shewed that it must by reasonable intendment be held operative there.

3. That the by-law was not unreasonable, or oppressive, or in restraint of trade, having been passed under a power expressly given by the legislature to the city to pass the same.

O'Donohoe, Q.C., for Boylan.

McWilliams, for the city of Toronto.

EACRETT v. KENT.

Landlord and tenant—Distress—Assignment for creditors.

The tenant of certain leasehold premises made an asignment under 48 V. c. 26 (O.), and afterwards ; but before possession of the tenant's property had been taken by the assigneee, or such property removed from the demised premises, the landlord distrained for rent past due before the assignment.

Held, that the landlord's right of distress was not affected by the assignment.

Held, also, that goods so assigned were not to be therefore deemed *in custodia legis*.

Gibbons, for the motion.

Aylesworth, contra.

[ROSE, J., 30TH DECEMBER, 1887.

In re CARPENTER AND THE TOWNSHIP OF BARTON.

Municipal corporation—Free road—By-law—Resolutions—Vote of ratepayers—Municipal Act 1883, s. 555.

A by-law was passed by the city of Hamilton on the 10th January, 1887, granting $5,000 towards the construction and completion of a free road leading into Hamilton from the east, to be paid when and so soon as the sum of $3,500 should have been contributed by the council of the township of Barton, or any other municipality, and private subscribers, and actually expended on the work of construction of the road, or on the purchase of the right of way therefor.

The payment was also made conditional on the construction and completion of the road in manner and on the terms and subject to the provisoes and conditions in the by-law contained.

Among other conditions was one that no money should be paid until the council of the township of Barton should have passed a by-law for the assumption of the road, and the proper maintenance thereof by the township, and until an agreement should have been entered into between the corporation of the township and the corporation of the city of Hamilton, providing for the maintenance of the road in a proper state of repair and as a free road for all time to come.

And it was further provided that before any moneys were paid, the city was to be satisfied and that the eastern free road should provide connection with the present system of township roads, to secure free travel from the top of the mountain, etc.

No date was fixed for doing the work or paying the money, and no provision made for levying the amount during the municipal year, nor was the by-law submitted to the vote of the people.

Held, that the by-law created a future indefinite contingent liability, and, if valid at all, ought to have been submitted to the vote of the ratepayers.

The city derived income from certain sources independent of taxes, but this income with the taxes levied left a deficiciency, which had been met by borrowing money from the banks, which was still unpaid, and no appropriation had been made for the payment of the $5,000.

Held, that this did not validate the by-law without submission to the people.

Resolutions and a by-law of the township of Barton dependent upon the Hamilton by-law *held* invalid as being part of an invalid arrangement attempted to be made under s. 555 of the Municipal Act of 1883.

Held, also, that the arrangement, if valid on other grounds and one for their joint benefit, might be entered into under s. 555 by the municipalities.

Held, also, that a by-law passed to open a free road solely for the purpose of enabling the public to avoid travelling

upon a toll road, and thus avoid the payment of tolls, the free road not being required for the public convenience, could not be supported; and the by-law and resolutions were quashed.

Robinson, Q.C., and *Jelfs*, for Carpenter.
Moss, Q.C., and *A. Bell*, for the township of Barton.
MacKelcan, Q.C., for the city of Hamilton.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 2ND DECEMBER, 1887.

CLARRY v. BRITISH AMERICA ASS. CO.

Reference—Ontario Judicature Act, s.47—Actions on fire insurance policies—Accounts.

Where in actions upon fire insurance policies the questions in issue between the parties were not confined to matters of mere account; but the defendants disputed their liability, and issues of fraud, misrepresentation, and concealment of facts were raised upon the pleadings:

Held, that an order referring all the issues in the action to a referee for inquiry and report was improperly made, and that the plaintiff was entitled to have a trial in the ordinary way.

Laidlaw, Q.C., and *Kappele*, for the plaintiff.
McCarthy, Q.C., and *Wallace Nesbitt*, for the defendants.

[5TH DECEMBER, 1887.

SEIFFERT v. IRVING.

Partnership—Goods supplied to inchoate company—Liability.

Where a number of persons signed a certificate under R. S. O. c. 158, contemplating forming themselves into a co-operative association, but did not ever complete the necessary preliminaries, and secure actual incorporation, and certain goods were furnished to them in good faith by the plaintiff:

Held, affirming the decision of BOYD, C., in an action for the price of the goods against certain of them, that the plaintiff was entitled to recover, for that the defendants were engaged in a trading concern, and with their associates formed a partnership. They were not a company, having failed to fulfil the preliminary requirements of incorporation, and therefore they were a partnership.

Moss, Q.C., for the plaintiff.

Lash, Q.C., for the defendants.

[7TH DECEMBER, 1887.

WATT v. CLARK.

Settlement of action—Powers of solicitor—Instructions from client.

After the trial of an action had been postponed at the assizes and the defendant had left the assize town, D., his solicitor and counsel, effected a settlement with the plaintiff which was given effect to by the entry of a verdict and judgment by consent. D. admitted that he was not instructed, but relied on his client adopting the settlement, which was in D.'s opinion a favourable one. The defendant said that he had instructed D. not to settle in the way he did.

Held, that the defendant was entitled to have the verdict and judgment set aside and a new trial, on payment of costs.

H. J. Scott, Q.C., for the defendant.

Aylesworth, for the plaintiff.

[21ST DECEMBER, 1887.

SIMMONS v. SHIPMAN.

Title to land—Possession—Statute of Limitations—Successive occupiers without mesne conveyances.

Held, reversing the decision of O'CONNOR, J., that to bar the true owner, and give a possessory title to land under the Statute of Limitations, the fact of actual possession is the material thing, and this possession must be of a continuous character by successive occupants claiming in some sufficient way under each other, but it is not necessary that this possession should be strengthened or corroborated by intermediate

conveyances. The Act speaks of possession without reference to conveyances. It is not correct to say that whenever in an action for the possession of land the plaintiff seeks to shew a title by length of possession by himself or those through whom he claims, he must in order to succeed be able to shew a deed or writing from each former occupant or possessor to the occupant or possessor next succeeding him, or inevitably fail in his action.

McMichael, Q.C., and *W. H. Jones*, for the plaintiff.
Britton, Q.C., for the defendant.

MORGAN v. MORGAN.

Dower—Damages for detention—Alienation by husband.

Held, that a widow cannot recover damages for detention of dower where her husband did not die seised, even though she make demand for dower.

Lash, Q.C., for the defendant.
Idington, Q.C., for the plaintiff.

GOULDING v. DEEMING.

Chattel mortgage—Security for goods to be subsequently delivered—Insolvency—48 V. c. 26, s. 3.

Appeal from judgment of Rose, J., on the trial of an interpleader issue. The plaintiffs claimed, upon a certain chattel mortgage, certain goods of V. the judgment debtor. The defendant was the execution creditor. The mortgage was was made on 26th April, 1886, upon furniture and stock-in-trade present and future of V. It was to secure advances in goods to be made within seven months, and to the extent of $1,000. Goods were supplied thereunder from time to time up to 12th November, 1886, to the value of $620.75. V. prosecuted her business till 10th August, 1887, when the sheriff seized. V. appeared to have been insolvent when the chattel mortgage was given, but not to the knowledge of the plaintiffs. There was no evidence of fraud, and the transaction was an honest one throughout.

Held, that the transaction was within the meaning of 48 V. c. 26, s. 3 (1), and the mortgage was made by way of security for a present actual *bona fide* sale or delivery of goods. The mortgage became operative only as and when the consideration therefor from time to time arose by the delivery of the goods; and it then attached upon the chattel property only to the extent of the actual value of the goods supplied from time to time. The mortgage was therefore valid.

H. J. Scott, Q.C., for the plaintiffs.

Akers, for the defendant.

JONES v. MAGRATH.

Husband and wife--Direct deed from husband to wife.

The plaintiff purchased the lands in question from Susan Magrath for $3,000; received a conveyance dated 28th March, 1887, and paid the purchase money. Susan Magrath was the wife of James Magrath, who had by a previous deed dated 18th October, 1884, conveyed or purported to convey the lands to her for an expressed consideration of $100. The plaintiff now claimed possesssion of the lands against James McGrath, who defended on the ground that his deed to his wife was void.

Held, that the non-suit directed by the trial Judge must be set aside and a new trial ordered, for that the Judge had erred in holding that the conveyance from the husband to the wife was necessarily void to all intents and purposes.

E. T. English, for the plaintiff.

MacGregor, for the defendant.

CHRYSLER v. TOWNSHIP OF SARNIA.

Municipal corporation — Drainage — Action for damages — Notice in writing—R. S. O. c. 33, s. 30, s-s. 3—47 V. c. 8.

Held, affirming the decision of Rose, J., that the proper construction of the Ontario Drainage Act, R. S. O. c. 33, s. 30, s-s. 3, is that, as a prerequisite to the maintenance of an action for damages arising from neglect to repair, the

should be a reasonable notice in writing given by the plaintiff to the municipality alleged to be in default. This is not confined to the remedy by *mandamus*. It is intended to be for a safeguard to the municipality, so as not to expose them to litigation before their attention has been called to that which is specially within the cognizance of the individual complaining. The repeal of s-s. 3, and its re-enactment in 47 V. c. 8, makes it if possible more plain that a written notice should be given before the Court is resorted to.

Lash, Q. C., for the plaintiff.

Wallace Nesbitt, for the defendants.

[BOYD, C. 14TH, DECEMBER, 1887.

STRANGE v. RADFORD.

Mortgage action—Land in Manitoba—Sale or foreclosure.

In a mortgage action in the usual form seeking sale, delivery of possession, and relief under the covenant for payment, where the defendant resided in Ontario, but the mortgaged premises were in Manitoba ;

Held, that the mortgagor could be foreclosed, because such a decree acts upon the person and not upon the land directly, but that any extension of this doctrine, such as putting the machinery of the Court in motion to effect a sale of land in another Province, would be a mischievous novelty. If the defendant refused to execute the conveyance on sale, title would not pass to the purchaser by a vesting order. To carry out a sale, it is essential that the Court should have territorial jurisdiction over the land.

It is not the course of the Court to pronounce inoperative judgments.

T. Langton, for the plaintiff.

[12TH JANUARY, 1888.

ARMSTRONG v. DOUGLAS.

Attachment of debts—Assignment of debt—Garnishment after assignment—R. S. O. c. 116, s. 7—Res judicata—Demurrer.

A. recovered a judgment against B., and B. assigned to him an alleged debt due B. by D. A. then in the suit of A. v. B.

took garnishee proceedings against D. The attaching order and garnishee summons were made by one County Judge, returnable before another, and were subsequently discharged with costs. A. then, as assignee of B., brought this action, and D., among other defences, set up the garnishee proceedings as *res judicata*. To this defence the plaintiff demurred, the principal ground being that no jurisdiction was shown in the County Court.

Held, that even if jurisdiction was assumed, it did not appear that the disposition of the garnishee proceedings in the defendant's favour was on the merits. The assignment to the judgment creditor of the debt due by the intended garnishee to the judgment debtor having been perfected there was no longer a third party in the transaction; the debtor was directly liable to the assignee of the original creditor, as provided by R. S. O. c. 116, s. 7. The debt thus assigned was no longer within the purview of the debt attachment or garnishment clauses. A debt *bona fide* assigned by the judgment debtor before attachment cannot be garnished.

Demurrer allowed and leave to amend given.

G. C. Campbell, for the demurrer.

H. J. Scott, Q. C., contra.

[FALCONBRIDGE, J., 9TH JANUARY, 1888.

STORY v. McKAY.

Bill of exchange drawn in one country and payable in another—Law governing legality of consideration.

The defendant, while temporarily in New York, drew a bill of exchange upon a firm of merchants in Toronto, payable to the order of a New York firm of commission merchants. The defendant was at the time a domiciled Canadian of Ontario, and the firm of Toronto merchants were also domiciled Canadians. The draft was protested for non-acceptance, and upon the payees suing the defendant, he set up that the draft was given for a debt due from him in respect to certain gambling transactions on the New York stock exchange, and that as such it was under the law of New York an illegal contract and invalid.

Held, upon a special case directed to decide the point of law, that the matter must be governed by the law of New York, although the defendant was domiciled in Ontario, and although the drawees were also domiciled in Ontario.

Lefroy, for the plaintiffs.

Pearson, for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1887.

WELLBANKS v. CONGER.

Judgment—"The Court"—Trial Judge—Divisonal Court—High Court of Justice—Rules 315, 321.

The Court may upon motion enter judgment upon the verdict given at the trial, where the trial judge has not done so.

Quære, whether such motion should be to the Divisional Court.

"The Court" in Rules 315, 321, means the High Court of Justice; whether as distinguished from its divisions or not.

It was directed that an order for judgment should be drawn up in the High Court, before the three Judges who composed the Divisional Court of the Common Pleas Division, as Judges of the High Court.

Ritchie, Q.C., for the plaintiff.

W. H. P. Clement, for the defendant.

DUNDAS v. DARVILL.

Interpleader—Execution creditor not contesting claim—Liability for costs.

A banking corporation, one of several execution creditors made parties to an interpleader issue, did not desire to contest the right of the claimant to its share of the proceeds of the goods seized and sold, but was willing that such share should be paid over to the claimant, in the event of the latter not succeeding in the issue.

Held, that the corporation was not under these circumstances liable to contribute to the costs of the issue; but nevertheless was properly made a party to the issue, and would be entitled, if the claimant failed, to its proportion of the proceeds arising from the sale of the goods.

Aylesworth, for the Molsons' Bank.

Lash, Q.C., for the other execution creditors.

BUSH v. FRY.

Replevin—Factors' Act, R. S. O. c. 121, ss. 2, 4, 5—Agent entrusted—Sale of goods—Property passing.

Replevin. F., a music teacher at Beardstown, Ill., wrote to K. & Co. at Chicago that he had a customer named J. to whom he could sell a piano, and desiring them to ship one in their own name, to be subject to their order, but F. to pay freight charges in case of no sale, and return the piano to K. & Co., he F. simply to act as their agent. K. & Co. not having the style of piano required, handed F.'s letter to the plaintiffs, piano manufacturers in Chicago, who after communicating with F. shipped a piano to Beardstown, consigned to their own order, but to be delivered to F. on payment of the freight. The piano was delivered to F. at Beardstown, and its receipt acknowledged in a letter to the plaintiffs. It was then shipped by F. to Virginia City, Ill., and from thence to F. at Toronto, under the assumed name of R., and was there pledged by F. under such assumed name, with defendant D., a pawnbroker, to cover an amount lent by D. to pay the charges, as well as a further advance, F. representing that he intended opening an agency for the sale of pianos. The piano was taken by D. to his own premises, where it remained until replevied.

Held, that there was no sale to F. of the piano, as it never was intended that the property should pass to him.

Held, also that F. was not an agent within the meaning of the Factors' Act, R. S. O. c. 121, ss. 2, 4, 5, so as to enable him to pledge the piano; nor *per* ROSE, J., was he an agent entrusted.

A. Macdougall and *Wallace Nesbitt*, for the plaintiffs.

D. Urquhart, for the defendants.

TILL v. TILL.

Husband and wife—Wife living apart—Husband in possession of wife's land—Recovery of possession by wife—Claim for use and occupation—Divisional Court—Case reserved.

Under the O. J. Act, s. 25, s.-s. 2, a Judge sitting elsewhere than in a Divisional Court is to decide all questions properly coming before him, and is not to reserve any case, or any point in a case, for the consideration of the Divisional Court.

On the trial of an action, the pleadings were admitted to state the facts, and what was called "a special case on the pleadings" was reserved for the opinion of the Judges of this Division. On the case coming before the Divisional Court, it was

Held, that the special case, as such, could not be entertained; but the application was directed to be turned into a motion for judgment under Rule 323, or on the pleadings and admissions, under Rules 315 and 321.

The plaintiff and defendant, her husband, were married in February, 1865, the plaintiff then owning the lands in question in fee simple. The defendant was then carrying on business, which, at his wife's request, he sold out for $2,000, which he expended in improving the said lands. The plaintiff and defendant resided together on the lands until April, 1886, when they disagreed, and the plaintiff left the premises, the defendant and their only child continuing to reside thereon. The plaintiff brought an action for possession, and for use and occupation. No demand was made prior to service of the writ.

Held, following *Donnelly* v. *Donnelly*, 9 O. R. 673, that the plaintiff was entitled to possession: but she was only entitled to recover for the use and occupation since the service of the writ.

Held, also, that the defendant could not claim for the moneys expended on the land.

Hands, for the plaintiff.

N. Murphy, for the defendant.

COCHRANE v. HAMILTON PROVIDENT AND LOAN SOCIETY.

Ejectment—Judgment for default of defence—Estoppel.

Action for breach of an alleged agreement made between plaintiff as mortgagor and defendants as mortgagees, whereby, in consideration of the plaintiff having given the defendants a chattel mortgage on certain property, the defendants agreed to extend the time for payment of the mortgage for one year from 1st April, 1882. The defence was that on 17th June, 1882, the defendants brought ejectment against the now plaintiff, setting up that by the mortgage on default of payment of the mortgage moneys the now defendants should be entitled to take possession of the lands; alleging default, and by reason thereof the now defendants claimed possession; that the now plaintiff did not plead any defence to the action: and for default of any defence, on 30th September, judgment for possession was recovered.

Held, that the judgment so recovered estopped the now plaintiff from maintaining the present action.

J. B. Clarke and *Stone*, for the plaintiff.

Muir and *Wallace Nesbitt*, for the defendants.

HEINTZMAN v. GRAHAM.

New trial—Weight of evidence—Costs.

Replevin for a piano delivered to the defendant, as alleged by the plaintiffs, under an agreement that the piano was received by the defendant on hire for 24 months at $5.00 a month with right of purchase at $265; $15 cash, and balance by instalments; and until purchase money paid the piano to remain the plaintiffs' property; that default was made in the payments, and that the plaintiffs were entitled to take possession of same. The defendant stated that she purchased the piano, no mention being then made of the agreement, which was subsequently signed without the defendant's authority, by her daughter. The defendant was unable to read or write, though of fair business capacity. The evidence, as urged by the plaintiffs, showed authority from the defendant to sign

and also ratification by her. The jury found for the defendant.

The Court, not being satisfied with the finding, directed a new trial with costs to the successful party in the cause.

Delamere, for the plaintiffs.

D. O. Cameron and *F. McPhillips*, for the defendant.

[Rose, J., 5th November, 1887.

BOOK v. BOOK.

Probate—Validity of—Right to question.

The plaintiffs sued as executors under the last will and testament of B., deceased, alleging that the will was duly proved in the proper Surrogate Court.

The defendant denied the validity of the probate by reason of the mode of proof and invalidity of the will.

Held, on demurrer, that the defence was bad; that when it is desired to attack the validity of a probate, issued by a Surrogate Court having jurisdiction, and when the person on whose death the administration was issued is really dead, it must be done in an independent proceeding with the proper parties before the court.

Irwin v. *Bank of Montreal*, 38 U. C. R. 375, followed.

Quære, whether the application must be to the Surrogate Court or not.

Lash, Q.C., for the plaintiffs.

Moss, Q.C., for the defendant.

[See a decision in the same case reported 7 C. L. T. Occ. N. 114.—Ed.]

[30th December, 1887.

REGINA v. EDGAR.

Canada Temperance Act—Conviction for second offence—Inquiry as to previous conviction — Necessity for first deciding as to subsequent offence—S. 115, peremptory effect of—Certificate of previous conviction—Mode of drawing conviction.

S. 15 of the Canada Temperance Act, 1878, which provides for the case of previous conviction, requires that the magis-

trate "shall in the first instance inquire concerning such subsequent offence only, and if the accused is found guilty thereof, he shall then, and not before, be asked whether he was so previously convicted."

Held, that the language of the section is peremptory, and therefore to give a magistrate jurisdiction thereunder to inquire as to a previous conviction, he must first find the accused guilty of the alleged subsequent offence.

In this case, which was n conviction for a second offence, this was not done, and the conviction was therefore quashed.

Quœre, whether a certificate of a previous conviction is sufficient *prima facie* evidence of indentity of the accused with the person of the same name previously convicted.

Convictions should be drawn with care so as to specify that the offences are against the second part of the statute.

Aylesworth, for the defendant.

Delamere, contra.

[FALCONBRIDGE, J., 3rd January, 1887.

ANGLO-CANADIAN MUSIC PUBLISHING CO. v. WINNIFRITH.

Copyright—Proof of copyright—Domicile—Right of benefit of statute—Knowledge of copyright—Costs—Damages.

Motion for an injunction to restrain the defendants from importing and selling or offering for sale in Canada certain musical compositions, of which the plaintiffs claimed the copyright. The evidence as to copyright was that of the plaintiffs' manager, who stated on affidavit that plaintiffs were a company incorporated under the English Companies' Act for securing Canadian copyright in musical compositions and to acquire the protection of the Canadian Copyright Act, 1876, having their registered office in London, England, and their Canadian office at Toronto, and stating in a schedule to his affidavit the names of the said compositions and the dates of copyright.

Held, for the purposes of the injunction, that there was sufficient evidence of copyright.

It was objected on the hearing that the plaintiffs' domicile was in England, and not in Canada; and therefore the

plaintiffs were not entitled under s. 4 to the benefit of the Act; and that by s. 32, it should have been shewn that the defendants imported the publications with knowledge of the plaintiffs' right.

Held, that there was nothing in the objection as to domicile, for if they were assignees, then there was no restriction to the right to obtain copyright, so far as domicile or citizenship was concerned; but, if they were the authors, then the domicile was in London, where the head office is, and that is certainly a part of the British possessions within the meaning of the Act. In either case the plaintiffs were entitled to the sole and exclusive right of publishing and vending the works in Canada.

Held, also that it was not necessary to show that the publications were imported with knowledge of the plaintiffs' right, though that would be important on the question of costs and damages.

The defendants appeared to have innocently imported the books, and, on being made aware of the infringement by the service of the writ, expressed regret, and though they did not offer to undertake to discontinue the infringement, they stated in evidence that such was their determination.

Held, that the injunction must be granted, and had the defendants simply appeared on the motion, admitted the plaintiffs' rights, and consented to the injunction, no costs would have been imposed, but as the defendants had contested the plaintiffs' rights, and thus, to a certain extent, justified the plaintiffs' course, the plaintiffs were entitled to the costs.

Bain, Q. C., for the plaintiffs.

Hector Cameron, Q. C., for the defendants.

IN CHAMBERS.

[THE MASTER IN CHAMBERS, 30TH DECEMBER, 1887.

PARKER v. HOWE.

Attachment of debts—Dividends on insolvent estate.

A judgment creditor seeking to garnish funds due to his judgment debtor by S., served an attaching order upon the

assignee of S. under an assignment for the benefit of creditors. At the time of the service the assignee had in his hands the greater part of the moneys belonging to the estate of S., but had not declared a dividend; and before he did so, but after the service of the attaching order, the judgment debtor assigned to G. the dividends coming to him from the estate of S.

Held, that the judgment creditor was entitled as against G. to the dividends from the insolvent estate based upon the amount that was in the hands of the assignee when the attaching order was served.

McCraney v. *McLeod*, 10 P. R. 539, explained and followed.

A. H. Marsh, for the judgment creditor.

Aylesworth, for the claimant.

NOVA SCOTIA.

In the Supreme Court.

HARRISON v. SMITH.

Landlord and tenant—Tenant's fixtures—Removal after expiration of term by holder of bill of sale.

In an action to recover damages for the removal of fixtures from property of the plaintiff, occupied by the defendant as a tenant, the latter relied on a bill of sale from Q., a former tenant, by whom the fixtures had been placed upon the premises, and under whom the defendant had gone in.

The term for which Q. held having expired before the removal of the fixtures,

Held, that the plaintiff must recover, and that a verdict for the defendant must be set aside.

Judgment having been given for the defendant on a former trial, the Court now ordered that judgment be entered for the plaintiff, rather than send the case back for a new trial.

RIDDELL v. GORDON.

Arrest for unliquidated damages—Construction of Order 44, Rule 1—Assault.

The defendant, an officer of the ship *Ivy*, was placed in jail under an order for arrest in a suit to recover damages for an assault and battery committed upon the plaintiff, a seaman on board the vessel, while the ship was at sea, and also for wrongfully depriving the plaintiff of his clothing, etc.

An application to a Judge at Chambers for the defendant's release from arrest having been made and refused, the defendant appealed, on the main ground that under order 44, rule 1, there was no arrest for unliquidated damages.

Held, that the words of the order and rule relied on embraced the whole authority in relation to arrest conferred by R. S. (4th series) c. 91, s. 31; that it was not to be assumed that the framers of the rule intended to deprive litigants of the right to arrest conferred by that statute, in the absence of legislation; and that, though the rule was not clear in point of expression, the judge at Chambers had taken a proper view as to its intention.

The words of the rule "in which the defendant is now liable to arrest" refer to all cases in which the defendant could have been arrested under R. S. (4th series) c. 91, s. 31. This view is aided by the words of the order in relation to the security to be given.

FITCH v. CURRIE.

Trustee and cestue que trust—Mortgage by trustee—Notice to mortgagee.

In a suit in the Equity Court to recover a balance claimed by the plaintiff as due on a mortgage, judgment was given in that Court in the plaintiff's favor.

On appeal it appeared that the defendant J. C. had received a sum of money belonging to his infant son, A. M.

C., to invest in real estate. He appropriated a considerable portion of the money so received to other purposes. Subsequently he purchased a property from McD., taking the deed to himself as "trustee of A. M. C., of the city of H., an infant." For the purpose of raising the purchase money of the property so bought, he gave a mortgage to the plaintiff, in which he described himself as "trustee of A. M. C. of the city of H., an infant."

Held, (1) That as between the trustee and the *cestui que trust* the deed to the former gave the latter an interest in the land purchased which would be protected, and rights which would be enforced by the Court.

(2) That the words used in the deeds "trustee," etc., justified a legal inference of knowledge on the part of the plaintiff of the existence of the trust for the benefit of A. M. C., which placed the plaintiff, with respect to the rights of the infant, in no better position than the trustee.

COMMERCIAL BANK OF WINDSOR v. BECKWITH.

Discovery before defence—Discretion of Judge at Chambers—Order 31, Rule 1.

An order was made by a Judge at Chambers giving the defendant leave to deliver interrogatories to a number of officials of the plaintiff bank, and requiring such officials to make discovery on oath of certain documents, correspondence, etc. At the time the order was granted no defence to the action had been delivered.

Held, that, under order 31, rule 1, the judge had a discretionary power to make such order before the delivery of the defence.

Also, that the objection to the order on the ground that it ordered discovery and inspection as well as the delivery of interrogatories could not be sustained.

VICKERY v. PRICE.

Pleading—Refusal of non-suit—Judgment for want of prosecution—New trial—Amendment—Costs.

In an action against a surviving covenantor for rent due on a lease, the defendant pleaded a plea which was a substantial admission of the plaintiffs' case. At the trial the plaintiffs' counsel took the ground that on the pleadings the defendant should begin; the defendant's counsel refused to go on, and moved for a non-suit. The plaintiffs' counsel having refused to become non-suit, the learned judge reserved judgment, and subsequently gave judgment in favour of the defendant for want of prosecution.

Held, that the judgment could not be sustained.

The pleadings were struck out, and the cause sent back for a new trial; but, inasmuch as the Court was of opinion that the plaintiffs' counsel should have moved to amend the record, without costs.

OLAND v. BERTRAM.

Sale of goods—Action for goods sold and delivered—Set-off—Contract made by agent—Authority of agent.

Appeal from a judgment of the County Court Judge for District No. 1, in favour of the defendant, in an action for the price of goods ordered by the defendant through an agent employed by the plaintiffs to solicit orders in the course of their business. The defendant set up as a set-off a contra account for an advertisement of the plaintiffs' business in a newspaper of which the defendant was proprietor. The plaintiffs had previously advertised in the defendant's paper, but the time had expired, and the order for the goods sued for was obtained by the agent agreeing to continue the advertisement.

It appearing that the agreement was made without authority, the appeal was allowed with costs, and the judgment below reversed.

KENNY v. CHISHOLM.

Mortgagor and mortgagee—Purchase by mortgagee and sale to third party—Action on bond for balance due—Merger.

At a sale of mortgaged property held pursuant to an order of foreclosure and sale, the plaintiff, the mortgagee, became the purchaser for a sum less than the amount of the mortgage.

The plaintiff conveyed the property to a third party, and subsequently sued on the bond given collaterally with the mortgage, to recover the balance due after crediting the net sum for which the property was sold.

Held, McDONALD, C.J., and WEATHERBE, J., *dubitantis*, that the plaintiff was entitled to recover.

JENKINS v. TUPPER.

Discovery—Interrogatories—Examination—Action for account—Material facts—Discretion of Judge.

In an action for an account in relation to partnership dealings between the plaintiffs and the defendant respecting the purchase and sale of a mine, and for payment of the plaintiffs' share, which was alleged to have been improperly received and retained by the defendant, the plaintiffs, after the commencement of the action, obtained an order requiring the defendant to answer certain interrogatories. After receiving the defendant's answer a further order was obtained from a Judge at Chambers requiring the defendant to attend before a Master for further examination as to matter contained in certain of the interrogatories.

The defendant appealed on the ground that he was not obliged to answer until the plaintiffs had first established their interest.

It appearing that the facts sought to be elicited by the interrogatories were essential to the plaintiffs' case;

Held, that there was no ground for interfering with the discretion of the Judge below, and that the defendant must answer as required.

TRAVERS v. McMURRAY.

New trial—Evidence of witnesses on previous trial.

On a second trial an objection made by the defendant's counsel to using evidence taken on the former trial was overruled, and the plaintiff's counsel thereupon read the evidence of several witnesses on the former trial, including witnesses called for the defence.

The presiding Judge ruled that the plaintiff's counsel made the evidence of the defendant's witnesses his own by reading it, and gave judgment for defendant.

A new trial was ordered.

INGLIS v. MORRIS.

Intoxicating liquor—Provincial License Acts—Issue of licenses—Provisions of Halifax City Charter respecting—Repeal of by general Act—Express enactment required to revive—Application for license not recognized by law.

Action for a mandamus to compel the clerk of licenses for the city of Halifax to sign and issue, and the Mayor of the city to countersign a license to the plaintiff to "keep a saloon in the shop or building occupied by him . . and to vend therein provisions or victuals, and supply food or tobacco, and also to retail intoxicating liquors therein, conformably to law, until the 15th March, 1887."

The city charter, Acts 1864, c. 81, ss. 193, 194, as amended by the Acts of 1865, c. 87, s. 14, authorized the issue in the City of Halifax of three classes of licenses, viz., tavern, shop, and general licenses. The license applied for by the plaintiff belonged to the latter class.

By the Acts of 1869, c. 2, s. 4, the general license Act of the province was amended so as to prohibit the issue of any other than tavern and shop licenses, and, by s. 10, the amendment thus made was made applicable to the city of Halifax.

By the Acts of 1873, c. 1, providing for the publication of the Consolidated Statutes (4th series) all Acts not substantially incorporated therein were to be continued in force.

Held, that the amending Act of 1869, not having been substantially incorporated in the Consolidated Statutes, was not repealed.

Also, that, even if such Act had been repealed, the clauses of the city charter under which the plaintiff claimed his license had never been revived, and could only be revived by express enactment.

Also, that the license which the plaintiff required to have issued to him not being of a kind recognized by the law, there was no authority for granting it, and the plaintiff consequently could not succeed in his action.

McFARLANE v. SMITH.

Solicitor and client—Satisfaction piece—Depriving solicitors of costs—Fraud—Collusion.

Appeal from a decision refusing to set aside a satisfaction piece alleged to have been given in fraud of the plaintiff's solicitors for the purpose of depriving them of their costs.

The plaintiff had obtained a judgment against the defendant, from which the defendant appealed. While the appeal was pending one E. T., without the knowledge of the plaintiff's solicitors, and for an apparently very inadequate consideration, obtained an assignment of the judgment from the plaintiff, and a satisfaction piece, under the authority of which the judgment was discharged two days later.

It did not appear that there was any collusion on the part of the plaintiff to deprive the solicitors of their costs.

Held, that the appeal must be dismissed, but, in view of the peculiar nature of the circumstances, without costs.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

PROUDFOOT, J.] [10TH JANUARY, 1888.

PLATT v. GRAND TRUNK R. W. CO.

Appeal—Dismissal for delay—Extending time—Special circumstances—Judge in Chambers, powers and discretion of.

Motion to dismiss the defendants' appeal to this Court for want of prosecution. The judgment appealed from (12 O. R. 119) was pronounced on the 28th April, 1886, and notice of appeal was given within two weeks thereafter. Security was given at the end of June, but the draft appeal case was not sent to the plaintiff's solicitors till the 24th September following, and did not reach them till the 27th September. The period from that date till the 1st of March, 1887, was occupied by correspondence between the solicitors for the parties in an attempt to settle the appeal case, and at the end of that period it became apparent that there must be a motion to a Judge to settle the case. From the 1st of March, however, till the 28th of April, when a year had run from the pronouncing of judgment, nothing was done, and this motion was made on the 14th May, 1887. The reason given for the delay after the 1st March was that the appellants' solicitor thought it best to have the case settled by the Judge who tried the action, and that that Judge did not during the time in question hold Chambers, he being away on circuit. It was shewn, however, on the other side that he was not continuously absent during this period.

Held, by PATTERSON, J.A., that no special circumstances were shown to justify an extension of the time, and that the appeal should be dismissed for want of prosecution.

Held, on appeal, by the Court, that the Judge in Chambers had power to make the order dismissing the appeal, and that his discretion should not be interfered with.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants.

J. Maclennan, Q.C., and *T. Langton*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 6TH FEBRUARY, 1888.

ARCHBOLD v. BUILDING AND LOAN ASSOCIATION.

Mortgagor and mortgagee—Redemption—Six months' notice or interest after default—Interest post diem—Tender—Evidence.

T. borrowed money from the defendants and gave a mortgage over certain lands as security, with other securities as collateral, giving a second mortgage over the same lands to the plaintiff. Both mortgages being in default, the defendants agreed in writing with the plaintiff, who began foreclosure proceedings, that if he obtained a final order subject to their claim, they would accept from him a new mortgage over the same property for $15,000, payable in five years from date of order, with interest at eight per cent, and that he was "to have the privilege of paying any part of principal at any time." Upon payment as aforesaid the defendants were to assign to the plaintiff their mortgage from T. and all collaterals. The plaintiff obtained a final order and gave the defendants a mortgage dated 8th January, 1881, for the above amount payable at the expiration of five years, with interest at eight per cent half yearly, "until fully paid and satisfied." The mortgage provided after payment for assignment to the plaintiff of the original securities, and had a clause that "the mortgagor may at any time pay off the

whole or any part of the said $15,000, before the expiration of the said term of five years, and said mortgagees shall accept payment of any sum that may be paid to them by said mortgagor on account of principal, and interest shall thenceforth cease to grow due upon the sum so paid." After the expiration of five years the plaintiff paid interest at the specified rate, until the 1st January, 1887, and on the 22nd March following tendered the defendants the principal and interest at that rate up to that day, and demanded an assignment of the original mortgage and securities. The defendants refused to accept, claiming that they were entitled to six months' notice of the mortgagor's intention to pay, or to six months' interest in advance.

Held, ARMOUR, C. J., dissenting. 1st. That the rule followed by Courts of Equity in England that a mortgagor must, after default by him in payment of the money according to the proviso in the mortgage deed, give the mortgagee six calendar months' notice of his intention to pay off the mortgage unless the mortgagee has demanded or taken any steps to compel payment, has the force of law in Ontario.

2nd. That there were no circumstances in the present case to do away with its effect, the proviso for payment of the principal being limited to the five years within which the plaintiff had covenanted to pay the same.

3. That after the expiration of five years from the date of the mortgage there was no contract in force for the payment of interest, and the defendants could only claim as damages compensation for non-payment of principal at the time stated, and that the measure of damages should be the ordinary value of money while it was withheld and during the currency of the six months' notice.

4. That in this case the defendants were entitled to the six months' notice, and the tender on 22nd March, 1887, was insufficient, and as no evidence was given by the defendants as to the rate of interest after default, and evidence offered by the plaintiff on the point was refused at the trial, the legal rate of six per cent would be taken as the measure of damages.

S. H. Blake, Q.C., for the plaintiff.

Beaty, Q.C., and *Allan Cassels*, for the defendants.

REGINA v. TRIGANZIE.

Criminal law—Evidence—Character of prisoner—Evidence of prior conviction in rebuttal.

An indictment for an assault occasioning actual bodily harm contained a second count charging a prior conviction for an indictable offence. The offence disclosed by the indictment upon which the prisoner was tried was not one of that class of offences for which after a previous conviction for felony additional punishment might be imposed. The first part of the indictment only was read in arraigning the prisoner, and no allusion was made to the second part charging the prior conviction. The prisoner in his defence gave evidence of good character. The Crown gave some general evidence in rebuttal and then tendered under 32 & 33 V. c. 29, s. 26, a certificate to prove a prior conviction, and read the second clause of the indictment charging such prior conviction.

Held, that this evidence was not properly admissible as to character, and that such evidence can only be as to general reputation; evidence of a prior conviction going to the matter of punishment and not to general character.

Regina v. *Rowton*, 10 Cox C. C. 25, followed.

E. F. B. Johnston, for the Crown.

Dickson, Q.C., for the prisoner.

TRAVERSY v. TOWNSHIP OF GLOUCESTER.

Bridge—Approach—Liability of local municipality not taken away by s. 530 of the Municipal Act.

Section 530 of the Municipal Act, 46 V. c. 18, provides that, "The approaches for 100 feet to and next adjoining each end of all bridges belonging to, assumed by, or under the jurisdiction of any municipality or municipalities, shall be kept up and maintained by such municipality or municipalities; the remaining portion or portions of such approaches shall be kept up and maintained by the local municipalities in which they are situate."

The action was brought under Lord Campbell's Act. The deceased met with the accident which caused his death at the intersection of two roads, both alleged to be out of repair, and both lying within the boundaries of the defendant township, but one of them leading to a bridge under the joint jurisdiction of the city of Ottawa and the county of Carleton, and the approaches to which, therefore, under the above section, should have been kept up and maintained by the city and county. The point where the accident occurred was within one hundred feet from the end of the bridge, but it was not shown that there was any artificial structure to enable the public to pass from the road on to the bridge, or from the bridge on to the road, which would cover the point where the accident occurred.

Held, reversing the judgment of ROBERTSON, J., at the trial, non-suiting the plaintiff; 1. That the word "approaches" in the section means all such artificial structures as may be reasonably necessary and convenient for the purpose of enabling the public to pass from the road on to the bridge, and from the bridge on to the road, and does not include the highway to the distance of one hundred feet from each end of the bridge, at all events unless the artificial structures extend so far.

2. That in any case section 530 does not relieve the local municipality from its statutory liability to repair, but merely gives the local municipality the right to enforce its provisions against the municipality or municipalities owning the bridge.

Shepley, for the plaintiff.

J. K. Kerr, Q.C., for the defendants.

HAISLEY v. SOMERS.

Assessment and taxes—Tax sale—Duty of treasurer.

The treasurer is bound by s. 137 of R. S. O. c. 180 to exercise his discretion, in a sale of land for taxes, for the benefit of the owner, and s. 129 does not relieve him from this duty.

The history of these sections.

McCullough, for the plaintiff.

Hewson, for the defendant.

LEWIS v. GODSON.

Landlord and tenant—Ownership of stones gathered in clearing land.

A tenant who, for the purpose of clearing the land and rendering it more fit for cultivation, collects the stones therefrom, has the property in the stones, and the landlord has no interest in them and is liable for their value if he disposes of them.

Saunders v. *Breakie*, 5 O. R. 603, commented on.

McCullough, for the plaintiff.

T. P. Galt, for the defendants.

REGINA v. MONTEITH.

Canada Temperance Act—Territorial limits of county of Simcoe—Stipendiary Magistrate of Parry Sound, jurisdiction of.

The defendant was convicted at the village of Parry Sound by the Stipendiary Magistrate for the district of Parry Sound, for a sale in the township of Humphrey of intoxicating liquor, contrary to the Canada Temperance Act. 1878.

Held, that the township of Humphrey was within the territorial limits of the County of Simcoe, and that the Canada Temperance Act being in force in the County of Simcoe was therefore in force in the township of Humphrey.

Regina v. *Shavelear*, 11 O. R. 727, qualified.

Held, also, that the township of Humphrey formed also part of the district of Parry Sound for certain judicial purposes, and that the Stipendiary Magistrate for the district of Parry Sound had jurisdiction to try offences against the Canada Temperance Act committed in that township.

Aylesworth, for the defendant.

Delamere, contra.

HEYDEN v. CASTLE.

Landlord and tenant—Covenant by tenant to pay taxes—Tenant becoming purchaser at tax sale.

K. and others on the 1st of October, 1880, leased to C. and another, two parcels of land for four years, the lessees covenanting to pay all taxes, rates, etc., "which now are or which during the continuance of the term hereby demised shall at any time be rated," etc. In March, 1881, the lessors mortgaged one of the parcels to H. In December, 1883, part of the mortgaged land was sold to C., one of the lessees, for the arrears of taxes to 31st December, 1882, and a conveyance was subsequently made to him by the warden and treasurer. It appeared that the land was sold for the taxes due for the years 1880 and 1882, with interest and costs.

In an action brought by the mortgagee, H., to set aside the tax deed as a cloud on the title, or to have the tax purchaser declared a trustee for the plaintiff,

Held, that the tax purchaser could not hold the title so acquired against his lessors and the plaintiff, the lessees being bound under the covenant to pay the taxes for which the land was sold.

Semble, per ARMOUR, C.J., that under the circumstances the tenant would be a trustee for his landlord, because of the relationship existing between them.

McNaughton v. *Wigg*, 35 U. C. R. 111, considered and doubted.

Strathy, Q.C., for the plaintiff.
Pepler, for the defendant.

HICKS v. WILLIAMS.

Title to land—Crown grant—Statute of Limitations—Estate by curtesy.

In an action for the recovery of land, it appeared that the land was granted by the Crown in 1838 to the plaintiff's mother, who was then a married woman, and who had by her husband issue born alive and capable of inheriting the estate. The patentee died in 1856; her husband lived till 1883.

Neither was ever in possession, nor were their heirs at law. The defendant claimed by possession, which began in 1853, and had continued thenceforward without interruption.

Held, following *Doe Corbyn* v. *Bramston*, 3 Ad. & El. 63, that the patentee having been dispossessed within the terms of the statute, R. S. O. c. 108, s. 5, in 1853, more than twenty years before this suit was commenced, the action was barred by s. 44 of that Act, notwithstanding the continuation until 1883 of the estate by the curtesy of the plaintiff's father.

Wm. Kerr, Q.C., and *Aylesworth*, for the plaintiff.

H. Becher, Q.C., for the defendant.

CLENDENAN v. BLATCHFORD.

Easement—Right of way on condition of fencing.

The plaintiff's predecessor in title had granted to the defendant's predecessor in title a right of way over land afterwards conveyed to the plaintiff, such right of way being conditioned upon the grantees thereof "fencing and keeping in in repair" the roadway over which the easement was granted. Shortly afterwards the grantees fenced the sides of the roadway and put gates at each end of it.

Held, that on the proper construction of the instrument the right of way was dependent upon the defendant's maintaining fences not merely at the sides of the way in question, but also at the ends of it, where they might have gates as part of the fences.

Held, also, that even if this was not the proper construction of the instrument, the plaintiff as owner of the soil was entitled himself to fence the ends of the way, putting gates therein of such width and construction as would reasonably admit of the right of way being conveniently used.

Aylesworth, for the plaintiff.

Lash, Q.C., for the defendant.

In re GRAHAM v. TOMLINSON.

Prohibition—Division Court—Notice disputing jurisdiction—Ascertainment of amount.

The operation of s. 14 of the Division Courts Act, 1880, is restricted to cases within the general jurisdiction of the

Division Courts, and the absence of a notice under that section disputing the jurisdiction, cannot give jurisdiction where the amount claimed is beyond the competence of a Division Court.

In re Knight v. *Medora*, 14 A. R. 112, and *In re Mead* v. *Creary*, 31 C. P. 1, followed.

But, where a cheque for $122.00 was given to the defendant by the plaintiff, as a loan of the money represented by it,

Held, on motion for prohibition, that the indorsement of the signature of the defendant on the cheque was a sufficient ascertainment of the amount of the plaintiff's claim by the signature of the defendant to satisfy s. 54 of R. S. O. c. 47, as amended by s. 2 of 43 V. c. 8, and to give a Division Court jurisdiction.

Kinsey v. *Roche*, 8 P. R. 515, overruled, and *Wiltsie* v. *Ward*, 8 A. R. 549, and *Forfar* v. *Climie*, 10 P. R. 90, considered.

C. C. Robinson, for the plaintiff.
Morson, for the defendant.

In re CURRY.

Arbitration—Extending time for making award—Death of party—No provision for appeal—Statute of Limitations.

Two persons submitted certain matters in dispute between them to the award of a barrister of character and standing. The submission provided that the death of either party should not operate as a revocation of the power and authority of the arbitrator; there was no provision for an appeal from his award. The arbitrator allowed the time for making his award to run out before entering on the reference. One of the parties had died since the submission, and the survivor now applied to the Court to enlarge the time. It appeared that the Statute of Limitations had so run since the submission as to bar portions of the applicant's claim.

Held, reversing the decision of ROSE, J., that the facts of the death and the absence of the right of appeal would not warrant the Court in refusing to enlarge the time, and that

under the circumstances no injustice would be done by enlarging it.

Edwards v. *Davies*, 23 L. J. Q. B. N. S. 278; *Brown* v. *Williams*, 6 D. & L. 235; *Lord* v. *Lee*, L. R. 3 Q. B. 404; *Denton* v. *Strong*, L. R. 9 Q. B. 117, referred to.

Aylesworth, for the applicant.

H. J. Scott, Q.C., contra.

[ARMOUR, C.J., 16TH JANUARY, 1888.

LAING v. SLINGERLAND.

Arrest—Capias—Affidavit—"Intent to defeat."

The use in the affidavit upon which an order for the issue of a *ca. re.* was granted of the words "intent to defeat" instead of "intent to defraud," the latter being the words prescribed by R. S. O. c. 67, s. 5,

Held, not fatal to the arrest.

Neven v. *Butchart*, 6 U. C. R. 196; *Hargreaves* v. *Hayes*, 5 E. & B. 272; *McInnes* v. *Macklin*, 6 U. C. L. J. 14; *Swift* v. *Jones*, 6 U. C. L. J. 63; *Bamberg* v. *Solomon*, 2 P. R. 54, referred to.

Aylesworth, for the plaintiff.

Watson, for the defendant.

[MACMAHON, J., 10TH FEBRUARY, 1888.

HEDDLESTONE v. HEDDLESTONE.

Devise of land—Restraint on alienation—Invalidity of devise.

A testator devised as follows: "I also will that that portion of the within mentioned lands which I have hereby bequeathed to my son William, to my son Robert, and to my son James, shall not be disposed of by them either by sale, by mortgage, or otherwise except by will to their lawful heirs.

Held, that the restriction was invalid, and that the plaintiff, one of the devisees, was entitled to hold the land freed from the restriction.

A. H. Marsh, for the plaintiff.

J. Hoskin, Q.C., for the infant defendants.

IN CHAMBERS.

[BOYD, C., 9TH JANUARY, 1888.

HARVEY v. McNEIL.

Creditors' Relief Act—Mortgage action—Execution creditors against lands—Ratable distribution of proceeds of sale—Foreclosure judgment

The Creditors' Relief Act applies to execution creditors against land in question in a mortgage action for foreclosure or sale, and all such creditors must share ratably in the proceeds of sale.

Semble, in the case of foreclosure, the old form of decree giving execution creditors as subsequent incumbrancers, liberty to redeem according to their priorities, is no longer applicable.

In this case the judgment for foreclosure was changed to sale, and the following order was pronounced on appeal from a Master's Report :—let the land be sold, and declare that after paying what is due to the mortgagee, and interest and costs applicable to his claim, the balance be divided ratably between the execution creditors, who are each to add their costs of this appeal to their claims, and any other execution creditors who may come in before the Master, on his calling for such claims before report on sale.

C. J. Holman, for the defendant Warnock.
Middleton, for the plaintiff.

[10TH JANUARY, 1888.

ARPIN v. GUINANE.

Venue—Preponderance of convenience—Disclosing the names and evidence of witnesses.

The plaintiff lived in Montreal, and the defendant in Toronto; the plaintiff had twenty-six witnesses in Montreal, and the defendant twenty-eight in or near Toronto. On a motion to change the venue from Cornwall to Toronto the Master in Chambers directed the parties to put in affidavits disclosing the names and the nature of the evidence of the

witnesses, and upon these determined that the evidence of some of the Montreal witnesses would be irrelevant to the issues, while all the Toronto witnesses might be important, and upon the preponderance of convenience changed the venue to Toronto. Upon appeal,

Held, that the conclusion of the Master as to the evidence was correct and his order for change of venue proper upon the affidavits before him; but

Semble, the direction to disclose the names and evidence of witnesses was improper; not having been appealed against, however, and having been complied with, it could not be disturbed.

Hoyles, for the plaintiff.
H. T. Kelly, for the defendant.

[ARMOUR, C.J., 7TH FEBRUARY, 1888.

ODELL v. CITY OF OTTAWA.

Discovery—Examination of servant of corporation.

In an action for damages for negligence against a corporation, in which the complaint was that a traction engine of the defendants had caused an accident which resulted in injury to the plaintiff, an order was made at the instance of the plaintiff for the examination for discovery of the driver of the engine.

Aylesworth, for the plaintiff.
Watson, for the defendants.

[ROBERTSON, J., 6TH FEBRUARY, 1888.

HARNETT v. CANADA MUTUAL AID ASSOCIATION.

Discovery—Examination of local agent of life insurance company.

In an action upon a life insurance policy an order was made, at the instance of the plaintiff, for the examination for discovery only of the local agent of the insurance company who procured the application for insurance.

O'Sullivan, for the plaintiff.
Masten, for the defendants.

[STREET, J., 20TH JANUARY, 1888.

In re SOLICITOR.

Solicitor and client—Reference to taxation at solicitor's instance—Order for payment—Costs of reference.

A solicitor who has obtained an order for taxation of his bill of costs against his client, and taxed his bill under it, is not entitled to a summary order for payment of the amount found due. Where the client obtains the order for taxation, he thereby submits himself to the summary jurisdiction of the Court, and there should be a clause in the order directing the payment by the client of the amount to be found due to the solicitor.

Semble, also, that the order for taxation under Rule 443, should, under the authority of s-s. (d.) of that Rule, where it is made upon the client's application, contain an order for the payment by him of the amount to be found due upon the reference, but when it is made upon the solicitor's application, should contain no such order. The solicitor should be entitled to add the costs of the reference to his claim only in the event of the client appearing upon the reference.

Millar v. *Cline*, 12 P. R. 155, distinguished.

In re Harcourt, 32 Sol. J. 92, followed.

H. H. Macrae, for the solicitor.

No one for the client.

[21ST JANUARY, 1888.

In re ST. CATHARINES AND NIAGARA CENTRAL R. W. CO. AND BARBEAU.

Railway company—Incorporation by Provincial Act—Subsequent legislation by Parliament of Canada—Applicability of ss. 4 to 39 of the general Railway Act of Canada.

A railway company, incorporated by an Act of the Ontario Legislature, was thereby authorized to construct, equip, and operate a railway between certain points.

By an Act of the Dominion Parliament the Governor in Council was authorized to grant a subsidy to the company; and by another Act of the Dominion Parliament the company's railway was declared to be a work for the general advantage of Canada, and the company was authorized to build a branch line. No further powers of any kind were conferred upon the company by the Dominion Parliament.

Held, that the effect of the declaration that the railway was a work for the general advantage of Canada was to bring it under the exclusive legislative authority of the Parliament of Canada, but that the Acts of the Ontario Legislature previously passed were in no way affected; that the railway in question was not one "constructed or to be constructed under the authority of any Act passed by the Parliament of Canada" (see s. 3 of the Railway Act of Canada, R. S. C. c. 109); and therefore ss. 4 to 39 of R. S. C. c. 109 did not apply to it; and a motion to a Judge of the High Court of Justice under s. 8, for a warrant of possession of certain lands was refused.

Aylesworth, for the company.
Robinson, Q.C., for the land-owner.

McINTOSH v. ROGERS.

Vendor and purchaser—Verification of abstract—Mortgage thirty-six years old, presumption or proof of payment—Registration of instrument, evidence of—Possessory title, evidence of—Election to make perfect title, notwithstanding terms of contract.

Upon a reference as to title in an action to enforce specific performance of a contract for the sale of land, a solicitor's abstract was delivered by the vendor, and certain objections made by the purchaser to the verification of it. The purchaser appealed from the Master's rulings upon these objections.

(1) A mortgage by W. in 1851 to the M. B. Society was set forth in the abstract, and it was alleged that it had been paid and besides that it was barred by the Statute of Limitations, W. and those claiming under him having been in possession for thirty-six years. The mortgage

when produced had indorsed upon it a memorandum without date, purporting to be signed by the Secretary-Treasurer of the M. B. Society, that it was paid and settled in full, but the signature was not proved. The mortgage recited that W. had become the purchaser of two shares in the M. B. Society, and had agreed to pay £100 therefor; the proviso was for payment at the times appointed by the rules of the society, by monthly subscriptions to continue until the objects of the society should be attained. Affidavits were produced from the vendor and the persons who had owned the land during the ten years next before the contract, that they had paid nothing, and had never been asked to pay anything upon this mortgage. In a conveyance dated 3rd May, 1856, this mortgage was treated as a subsisting incumbrance, and in a conveyance dated 10th October, 1874, the grantor covenanted that he would procure a discharge of this mortgage. No evidence was given as to when the mortgage money became payable under the rules of the society, nor whether the objects of the society had been attained, nor any explanation as to why the mortgage had not been discharged, nor as to any difficulty in shewing payment.

Held, that this mortgage should not in favour of the vendor be presumed to have been satisfied; nor, having regard to the provisions of Chancery General Orders 394 and 396, should the question be disposed of upon a presumption of law. The vendor should shew that some portion of the purchase money did not become payable under the rules of the society within the period of ten years before the contract, or that this could not be ascertained; that the records of the society could not be referred to; or that there was difficulty in proving the fact set forth in the indorsement on the mortgage that it had been paid in full.

(2) The purchaser required evidence of the registration of a deed from L. G. and other named persons to S. G., which deed was set out in the abstract and stated to be registered. The vendor produced a deed answering the description in the abstract, but having no certificate of registration indorsed upon it, and a registrar's abstract containing a statement of the registration of a conveyance bearing the same date and covering the same land as the abstracted deed, but setting forth the parties to it only as "L. G. *et al.* to S. G."

Held, that the purchaser was entitled to some further proof of the identity of the registered conveyance with the one produced; either the production of a certified copy of the registered conveyance or the certificate of the registrar indorsed upon the instrument produced that the original was registered in his office. The purchaser was not bound to take the instrument produced and examine it with the registered instrument, or procure a copy at his own expense.

Re Charles, 4 Ch. Chamb. R. 19, not followed.

(3) The vendor set out a perfect paper title in his abstract, and wound up with an assertion that he had also a good title by virtue of the Statute of Limitations.

Held, that if the vendor relied upon the possessory and not the paper title, the purchaser would be entitled to stricter and more satisfactory and complete evidence, and should have the persons who made affidavits produced for cross-examination, for the reasons given in *Re Boustead and Warwick*, 12 O. R. at p. 491.

(4) It appeared that the vendor had elected to make out a title perfect both as to abstract and verification, in order that he might compel the purchaser to accept it.

Held, that this being so, the purchaser was entitled to have the title made out as strictly and completely as if the vendor had not in any way guarded himself by the terms of the contract.

[As to the operation and effect of the contract, see this case reported 14 O. R. 97; 7 C. L. T. Occ. N. 266].

Hoyles, for the plaintiff.

G. W. Marsh, for the defendant.

[4TH FEBRUARY, 1888.

EMERSON v. GEARIN.

Counter-claim—Costs—Construction of order.

Although for some purposes a claim and counter-claim form but one action, yet the costs of the counter-claim are to be taxed separately from the costs of the action, a counter-claim being for the purposes of taxation to be treated as a cross-action.

McGowan v. *Middleton*, 11 Q. B. D. 464, and *Beddall* v. *Maitland*, 17 Ch. D. 174, followed.

And where the order of a Divisional Court varied the judgment at the trial by directing that the counter-claim, should be struck out and not dismissed, and should be disposed of in a separate action, and also directed that the defendants should pay into Court the amount of the costs *of the action*, but was silent as to the costs of the counter-claim,

Held, that the rights of the parties must be governed by this order, and not by anything that preceded it, and that under it the plaintiffs were not entitled to tax the costs of the counter-claim.

McClive, for the plaintiffs.

H. H. Collier, for the defendants.

[MacMahon, J., 9th February, 1888.

REGINA *ex rel.* CHAUNCEY v. BILLINGS.

Municipal elections—Quo warranto—Defective material—Statement—Recognizance—Affidavit—Amendment.

Upon an application for a *fiat* for the issue of a summons in the nature of a *quo warranto* under the Municipal Act of 1883, to try the validity of the respondent's election as a municipal councillor, the statement of the relator did not shew that he was a candidate or an elector who voted or tendered his vote at the election, as required by s. 185 of the Act; and the recognizance filed by the relator was not entered into before a Judge or commissioner for taking affidavits nor allowed by the Judge, in the manner prescribed by s. 186, nor was it conditioned to prosecute the writ with effect; and the affidavit of the relator in support of the application did not set out fully and in detail the facts and circumstances alleged in the statement, as required by Rule 2 of the Rules of Michaelmas Term, 14 Vict.

Held, that these were defects in the material necessary to ground the application, not mere irregularities which could be amended at a later stage: and the *fiat*, the writ, and all proceedings were set aside with costs.

R. Boultbee, for the relator.

W. H. P. Clement, for the respondent.

[THE MASTER IN CHAMBERS, 1ST FEBRUARY, 1888.

BROWN v. PEARS.

Discovery—Action for specific performance—Examination of grantors of vendor before defence—Objections to title—Condition in contract—Time.

In an action by a vendor for specific performance of a contract for sale of land, at the price of $24,000, it appeared that less than three weeks before the contract the vendor had obtained a conveyance of the land from his two sisters, in which the consideration expressed was $5,000. The sisters were old and infirm, and being unmarried lived, and had for a great many years lived, with the plaintiff, and were said to be under his influence. The defendant was advised that so great a difference in the price required explanation, and had made endeavours to see the sisters, but had been refused access to them, and the plaintiff had refused to procure them to join in the conveyance to the defendant.

Held, that under these circumstances the defendant should be allowed under Rule 285, to examine the two sisters before delivering his defence.

It was contended on behalf of the plaintiff that the title could not now be objected to by the defendant, as by the terms of the contract all objections to the title were to be notified by the 26th December, 1887, and this was not taken until a week later.

Held, following *Want* v. *Stallifras*, L. R. 8 Ex. 175, that such a condition did not apply to the case of the vendor being unable to give a good title, but only to objections and requisitions which might have been properly enforced against a vendor who had a valid title; and the objection here might go to the root of the plaintiff's title.

Watson, for the plaintiff.

Allan Cassels, for the defendant.

[6TH FEBRUARY, 1888.

FOLEY v. LEE.

Action—Dismissal for non-prosecution—Motion by two defendants where there are others.

A motion by two of the defendants to dismiss the action as against them for the plaintiff's default in not proceeding to

trial was refused, where it appeared that one of the defendants, a necessary party, had for apparently sufficient reasons not been served with the writ of summons, while the action had proceeded against the other defendants, and as against them was ripe for trial.

Held, that it was the duty of the applicants to have applied to the plaintiff's solicitor for information as to the state of the cause in regard to the other defendants, before making such a motion.

J. M. Quinn, for the motion.

G. W. Holmes, contra.

[WELLER, LOCAL J., 14TH FEBRUARY, 1888.

O'SULLIVAN v. BELLEGHEM.

Time—Computation—"Till."

A motion made before one of the Local Judges at Peterboro' to set aside the note entered by the plaintiff on the 20th January, 1888, under rule 596, closing the pleadings against the defendant, as in default of defence. The defendant had previously obtained an order extending the time for delivering his defence "till the 20th January instant."

L. M. Hayes, for the motion, cited *Dakins* v. *Wagner*, 3 Dowl. 535; *Kerr* v. *Jeston*, 1 Dowl. N. S. 535; *Isaacs* v. *Royal Ins. Co.*, 5 Ex. 296; *McDonell* v. *McEwen*, 6 P. R. 18.

John O'Meara, contra.

WELLER, LOCAL J.—I am of the opinion that in an order of the kind made by me the word "till," without some qualifying word, for example "exclusive," means inclusive of the day to which it is prefixed. Therefore the plaintiff was wrong in causing the pleadings to be noted closed on that day. The plaintiff, having taken the chance of being strictly correct, should pay the defendant's costs of the motion.

MANITOBA.

In the Queen's Bench.

[TAYLOR, C.J.

In re LEWIS.

Real Property Act—Proof of intestacy—Power of personal representative.

A mortgagor of lands died intestate. His administrator released the equity of redemption to the mortgagee, who applied for a certificate of title. The lands had not previously been exempt under the provisions of the Act.

Held, 1. That production of letters of administration was not sufficient proof of the death intestate.

2. That the administrator had no power to release the equity of redemption, because the property had not theretofore been brought under the provisions of the Act, and even in case of land under the Act, a personal representative cannot convey until he has been registered as owner.

WISHART v. BONNEAN.

Charging order—Style of matter—Notice of reading affidavit.

A solicitor's petition for a charging order should be intituled in the matter of the Act.

The petition or notice must shew upon what material it is grounded.

TOUSSAINT v. THOMPSON.

Demurrer overruled—Costs, payment of before pleading.

A demurrer to the declaration was overruled. The defendants appealed and again failed. They then applied for leave to plead, which was granted, but only upon condition of first paying the costs of the demurrer and appeal.

McMICKEN v. ONTARIO BANK.

Married woman—Next friend.

The modern statutes have not affected the rule that a married woman must sue by a next friend where the suit relates to her separate property.

EVANS v. BOYLE.

Costs, security for—Plaintiff suing for benefit of others.

Upon an application for security for costs, it appeared that the plaintiff had assigned the cause of action to three persons. After the application had been made two of these persons re-assigned to the plaintiff.

Held, that no order for security should be made; although had one existed it would not under such circumstances have been discharged.

REGINA v. COLLINS.

Criminal law—Summary conviction—Rule nisi—Habeas Corpus—Certiorari.

A rule to quash a conviction may in the first instance be to shew cause why a writ of *habeas corpus* should not issue, "and why in the event of the rule being made absolute, the prisoner should not be discharged out of custody without the issuing of the said writ and without his being brought before the Court."

The rule may at the same time ask for a writ of *certiorari*.

A warrant of commitment which recites a conviction must show upon the face of the recited conviction, that the defence was one over which the committing magistrate had jurisdiction.

Where therefore the conviction was for obtaining $12 by false pretences, and by statute the convicting magistrate

could only convict and pass sentence in case the prisoner pleaded guilty, and the conviction did not show that the prisoner had so pleaded,

Held, that the conviction ought to be quashed.

[KILLAM, J.

ATTORNEY-GENERAL OF CANADA v. RYAN.

Interlocutory injunction—Dominion lands—Railway trespasses—Continuing trespass—Public convenience—Ministers of the Crown—Disallowance.

1. The Sovereign is always to be deemed in possession of the lands of the crown. There can be no occupant of the Queen's possession.

2. Possession sufficient to enable a plaintiff to maintain an action of trespass, is the possession which is the test of the right to obtain an injunction.

3. An Act of the Province having been disallowed, the Order of the Governor-General-in-Council was published in the *Manitoba Gazette*, and following it was also published a certificate of the Governor-General of the day upon which the Act was received.

Held, that such publication was a sufficient signification of the disallowance.

4. "The Public Works Act," 48 V. c. 6, furnishes no authority to take compulsorily Dominion lands for the purpose of any provincial work, for the statute does not expressly relate to the land of the crown; and no authority under the words "the *enlargement or improvement* of any public work" to take lands for the purpose of changing ten miles of grade into sixty-three miles of railway.

5. When railway companies or individuals exceed their statutory powers in dealing with other people's property, and an injunction is sought to restrain their actions, no question of damage or public convenience is raised.

6. A continuing trespass amounting to permanent appropriation of the property of another, is, of itself, a sufficiently serious injury to warrant interference by injunction.

7. Upon motion for an interlocutory injunction where the right is doubtful, the Court will consider on what side is the balance of convenience; to which party is injury more likely to be done by its interference or refusal to interfere; in what way the parties can best, after the final determination of their rights, be kept in, or restored to, their position at the time of the motion.

8. The Court has jurisdiction to grant an injunction, at the instance of the Attorney-General for the Dominion, in respect of trespass upon crown lands.

9. Persons claiming exemption from the law must show some reason or authority leaving no doubt upon the subject. And where two persons who were provincial ministers of the crown directed a trespass upon lands of the Dominion and showed no such exemption, an injunction issued against them.

IN CHAMBERS.

[DUBUC, J.

DALY v. WHITE.

Costs, security for—Newspaper libel—Action commenced before statute complied with.

A statute provided that defendants in actions of libel might under certain circumstances obtain security for costs. Another clause provided that no person who had not complied with the provisions of this statute, as to registration, etc., should be entitled to the benefit of it.

Held, that compliance with the provision of the statute after action brought did not entitle the defendant to the benefit of the Act.

BRITISH COLUMBIA.

In the Supreme Court.

[IN BANC.

REGINA v. JOHN.

Criminal law—Rape—Assault with intent to commit rape—Verdict—Sentence.

Upon an indictment with a single count for rape, the jury found: "The prisoner is not guilty of the felony whereof he stands indicted, but is guilty of assault with intent to commit rape." The prisoner was sentenced to two years' imprisonment. Upon error assigned, "that it is not competent for the jury upon an indictment with a single count for rape, to return a verdict of assault with intent to commit a rape," the members of the Court were divided in opinion.

Held, per BEGBIE, C.J., and CREASE, J., that the verdict was equivalent to one of attempt to commit the crime, and was sustainable under s. 183 or s. 191 of R. S. C. c. 174.

Per GRAY and WALKEM, JJ.—The verdict finds the prisoner guilty of a distinct misdemeanour under R. S. C. c. 162, s. 38, for which he was not indicted. No verdict has been found for assault under R. S. C. c. 174, s. 191, or for an attempt under s. 183. You cannot cut down the words of the verdict and say it is an assault, for the reason that the jury have expressed a different opinion. Besides, the assault under s. 191, and the attempt under s. 183 are punishable differently from the assault with intent to rape. It is impossible not to conclude that Parliament intended a difference between the offences, and we are bound to give the language of Parliament its proper effect.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

PROUDFOOT, J.] [10TH JANUARY, 1888.

WOODWARD v. McDONALD.

Reference to arbitration—Stay of proceedings—C. L. P. Act, s. 314—Scope of reference—Construction of agreement—Pending action to reform—Powers of arbitrator—Injunction.

The judgment of PROUDFOOT, J., 13 O. R. 671; 7 C. L. T. Occ. N. 163, affirmed.

Magee, for the appellant.
Street, Q.C., for the respondent.

POWELL v. PECK.

Mortgage—Rate of interest post diem—contract or damages.

The order of PROUDFOOT, J. 12 O. R. 492; 6 C. L. T. 530, affirmed.

Delamere and *E. T. English*, for the plaintiff.
Beck, for the defendant.

FERGUSON, J.]

HYMAN v. HOWELL.

Assignment for creditors — Costs of attacking a fraudulent preference — Making good to the estate moneys spent on useless legal proceedings — Acquiescence by creditors.

The judgment of FERGUSON, J., 13 O. R. 400 ; 7 C. L. T. Occ. N. 103, affirmed.

Gibbons, for the appellants.
Lash, Q.C., for the respondents.

JAMES v. ONTARIO AND QUEBEC R. W. CO.

Railway—Expropriation of lands—Method of fixing compensation—The "taking"—Allowance of interest to land-owner.

The order of FERGUSON, J., 12 O. R. 624; 6 C. L. T. 533, affirmed.

Delamere and *E. T. English*, for the plaintiff.
R. M. Wells, for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[IN BANC, 6TH FEBRUARY, 1888.

REGINA v. BEEMER.

Criminal law—Quashing conviction— Forum—Single Judge or Court in banc— Ontario Judicature Act—Canada Temperance Act—Police Magistrate— Adjudication outside of territorial jurisdiction—41 V. c. 4, s. 9 (O.)

The jurisdiction to quash convictions was at the time of the passing of the Ontario Judicature Act in the Courts of

Queen's Bench and Common Pleas respectively, and was exercised and exerciseable by them respectively sitting in term; the Courts or Divisions of the High Court of Justice mentioned in s-s. 3 of s. 3 of that Act can respectively exercise all the jurisdiction of the High Court of Justice in the name of the High Court of Justice; the sittings of these respective Courts or Divisions are analogous to and represent the sittings of the former Courts of common law in term, and it is to the sittings of these Courts or Divisions that applications to quash convictions must now be made, having regard to the provisions of s. 87 and Rule 484 of the O. J. Act and of R. S. C. c. 174, s. 2, s-s. 1, and s. 270. These Courts or Divisions are not to be confounded with the Divisional Courts, which are a distinct organization under the Judicature Act, and invested thereby with special functions. S. 28 of the Act, upon which the supposition that a single Judge sitting in Court had jurisdiction to quash a conviction was founded, refers to civil actions and proceedings only.

And where a single Judge sitting in Court heard and determined a motion to quash a conviction, an appeal to the Judges of the Queen's Bench Division from his decision refusing to quash such conviction, was treated as a substantive motion to quash the conviction.

The Police Magistrate for the county of Brant, whose commission did not include the city of Brantford, convicted the defendant of an offence against the Canada Temperance Act committed at a place in the county outside of the city. The information was laid, the charge was heard and adjudicated upon, and the conviction was made in the city of Brantford.

Held, that the Magistrate had no jurisdiction to adjudicate in the city of Brantford; and that what he did was not authorized by 41 V. c. 4, s. 9 (O.)

(The conviction was before the Act 50 V. c. 11, s. 7, O.)

Irving, Q.C., *Moss*, Q.C., and *Delamere*, for the Crown.

Mackenzie, Q.C., for the defendant.

[THE DIVISIONAL COURT, 6TH FEBRUARY, 1888.

ADAMS v. WATSON MANUFACTURING CO.

Debtor and creditor—Partnership—Change in firm—Assignment for creditors under 48 V. c. 26—Rights of assignee—Fraudulent preference—Amendment—Rule 103.

The firm of R. & Co., consisting of three members, supplied goods to the defendants up to the 2nd December, 1885. After that date one of the members retired and assigned his interest in the assets of the firm to the remaining partners, who continued to carry on business under the same firm name, and subsequently made an assignment to E. under 48 V. c. 26 for the benefit of their creditors. E. sold to the plaintiff the account supposed to be due from the defendants to R. & Co. for the price of the goods supplied, and the plaintiff brought this action for the amount of such account.

The defendants, however, set up that the goods in question were not purchased by them, but were consigned to them for sale by R. & Co., and that the proceeds of the goods actually sold were by instruction of R. & Co. remitted to H. & Co., to whom R. & Co. had assigned the proceeds of such sale; and submitted that H. & Co. should be made parties.

At the trial it appeared from the evidence that the defence was undertaken and conducted for the defendants by H. & Co. The trial judge found that no debt had ever existed from the defendants to R. & Co., and dismissed the action, refusing to add H. & Co. as parties.

The plaintiff moved by way of appeal from this judgment, seeking to make H. & Co. and E. parties, and to charge the defendants in the character of bailees of the residue remaining unsold of the goods consigned to them by R. & Co., in which he claimed an interest, subject to the rights of H. & Co. if the transfer to them should be upheld, or absolute if that transfer should be set aside as a fraudulent preference.

Held, that these questions were "questions involved in the action" within the meaning of Rule 103, having regard

to the manner in which the defence was conducted, and to the fact that the transfer to H. & Co. was set up in the defence, and that the plaintiff should be allowed to amend under that Rule ; but that the amendment must be confined to the plaintiff's possible rights.

By s. 7 of 48 V. c. 26 E. was the only person entitled to enforce the right of the creditors of R. & Co. to set aside the transfer to H. & Co.; but that transfer was not made by the same firm of R. & Co. which assigned to E.; the two estates were distinct, and the creditors of the original firm, not the creditors of the new firm, were those against whom only a fraudulent preference by the original firm could be declared void. The plaintiff could have no higher right than E., through whom he claimed, and could not therefore attack the assignment to H. & Co.

The plaintiff was granted leave to amend by adding H. & Co. as defendants ; his claim against them to be limited to an account of their debt and of payments on account thereof, and as against the original defendants to obtain the unsold goods as soon as the debt due H. & Co. should be satisfied ; and by adding E. as a plaintiff upon filing his consent ; payment by the plaintiff of the defendants' whole costs to be a condition precedent ; FALCONBRIDGE, J., *dubitante* as to the disposition of costs.

G. T. Blackstock, for the plaintiff.
John Crerar, for the defendants.

[9TH FEBRUARY, 1888.

PHILP v. SMITH.

District Court—47 V. c. 14, s. 4, s-s. 5—Appeal to High Court.

Action brought in the Provisional Judicial District of Thunder Bay.

On 20th January, 1888, the Judge of the District Court ordered that the plaintiff might sign final judgment under

rule 80, and judgment was signed on 23rd January for $244.65 debt, and $76.07 costs.

The defendant appealed to the High Court of Justice, Queen's Bench Division.

D. W. Saunders contended that 47 V. c. 14, s. 4, s-s. 5, which allows an appeal to the High Court in District Court actions in certain cases, extended to a judgment granted under Rule 80.

H. Cassels, for the plaintiffs, contra.

THE COURT (ARMOUR, C. J., AND STREET, J.) held that the appeal must be to the Court of Appeal, and dismissed the motion with costs.

[STREET, J., 31ST JANUARY, 1888.

In re EAST ELGIN DOMINION ELECTION PETITION.

MERRITT v. WILSON.

Elections—Corrupt practice—Payment of voter's travelling expenses—Bona fide loan—R. S. C. c. 8, ss. 84 (a.) and 88.

H., a voter, who lived at a distance from St. Thomas, where he had a vote, was paid $1.60 by C., alleged to be an agent of the respondent, before the election, for the purpose of defraying his travelling expenses to St. Thomas and back. Both parties swore that it was understood between them from the beginning that the transaction was a loan and not a gift, and the amount advanced was repaid by H. shortly after the election, without any demand by C., and without any suggestion to H. by any one.

The trial judge found as a fact that the transaction was a *bona fide* loan and not a gift, that it was not made with the intention of influencing H.'s vote, or of inducing him to vote for the respondent, but that C. believed that H. would not go to St. Thomas at all on the polling-day unless funds to enable him to do so were lent to him.

Held, that the facts as found did not disclose an offence against either s. 84 (a.) or s. 88 of the Election Act, R. S. C. c. 8.

If C. had intended the payment as a gift, the case would have been within s. 88, provided the agency of C. were established, as a payment of the voter's travelling expenses; but it was expressly found to have been a *bona fide* loan.

If the position taken by a voter is equivalent to that which would be expressed by his saying to the candidate or his agent, "I will not vote unless you lend me a sum of money," and the money is thereupon lent to him, then the lending of the money would be to wilfully induce the voter to vote within the meaning of s. 84 (a.). But if the position of the voter is equivalent to that which would be expressed by his saying, "I am willing to vote, but cannot do so because I have not the means of going to the polling-place," then he is not induced, but merely enabled, to vote. The latter was the position of H. here, and no breach of the law was committed.

Loans made during the progress of an election must always be the subject of close scrutiny, and be open to the suspicion of having been made with an unlawful object, but if such a scrutiny reveals nothing stronger than the suspicion which has led to it, the loan must not be presumed to have been made for an unlawful purpose.

W. R. Meredith, Q.C., and *Crothers*, for the petitioner.
W. Cassels, Q.C., and *J. H. Coyne*, for the respondent.

[24TH FEBRUARY, 1888.

SCOTT v. BENEDICT.

Mortgagor and mortgagee—Redemption—Injunction to stay waste granted only on bringing into Court redemption money settled in former action.

The plaintiff in the present action was one of the plaintiffs in a former action against the defendants the Benedicts, in which former action it was determined that the mortgage of

the defendants over the lands in question had priority over the vendor's lien asserted by the plaintiffs. The plaintiffs were in that action permitted to redeem on the payment of $208,000, and upon their failing to do so the defendants took out a final order of foreclosure, and took possession.

The plaintiff now brought this action, alleging that the owner of the equity of redemption had not been foreclosed in the former action, that the plaintiff had acquired the interest of such owner, and asking to be allowed to redeem the same lands that were in question in the former action. The plaintiff was foreclosed in the former action, but he was then a party in a different right.

After the issue of the writ of summons the plaintiff moved for an *interim* injunction to restrain the defendants the Rathbun Co., who claimed under the defendants the Benedicts, from cutting and selling timber off the lands in question. It was not asserted that there was any wilful destruction of property; the defendants were cutting in the way of business; but in the opinion of the plaintiff the cutting was not advantageous to the property.

J. Maclennan, Q.C., for the plaintiff. The defendants are not here admitting the plaintiff's right to redeem; they say the plaintiff has no right to redeem; they claim as owners under the final order of forclosure, and the dispute is in fact between rival owners. This not being therefore a case between mortgagor and mortgagee in possession, the defendants should be enjoined until the trial from exercising acts of ownership. The accounts taken in the former action have no application to this case, and the plaintiff should not be required to bring into Court the redemption money upon the footing of those accounts as a condition of obtaining his injunction. The plaintiff is willing and offers to pay any amount that may be found due from him.

Moss, Q.C., and *Walter Barwick*, for the defendants. The money should be brought into Court; the plaintiff should not be encouraged in harassing litigation.

Hill v. *Kirkwood*, 28 W. R. 358; *Warner* v. *Jacob*, 20 Ch. D. 220; *Whitworth* v. *Rolls*, 20 L. J. Ch. 105; *McLeod* v. *Jones*, 24 Ch. D. 289, were referred to.

STREET, J., refused to grant the injunction unless a sum

of money was brought into Court upon the footing of the accounts taken in the former action.

Motion dismissed, the defendants by their counsel voluntarily offering to keep an account in the ordinary course of business of the logs cut, without in any way admitting any right on the part of the plaintiff to require such accounts, and without prejudice in any way to the rights of the defendants.

Costs reserved to be disposed of at the trial.

IN CHAMBERS.

[BOYD, C., 25TH FEBRUARY, 1888.

In re HARRIS.

Quieting titles—Advertisement—Posting at wrong Court House—Irregularity, waiver of—R. S. O. c. 113, ss. 45, 46--G. O. Chy. 504.

Where the advertisement in a Quieting Titles proceeding was posted at the Court House nearest the land in question, instead of at the Court House "of the county where the land lies," as required by G. O. Chy. 504,

Held, that the irregularity might under R. S. O. 1887, c. 113, ss. 45, 46, be waived.

Elgin Meyers, for the petitioner.

[ARMOUR, C.J., 15TH FEBRUARY, 1888.

BECKETT v. GRAND TRUNK R. W. CO.

Judgment—Date of entry—Rules 326, 327, 527 (b).

Although by Rule 527 (b.) judgment is not to be signed in cases tried by a jury till the time thereby prescribed, yet

when signed, the entry of it, if the Divisional Court pronounces no different judgment from that of the trial Judge, ought to be dated as of the day on which it was pronounced by the trial Judge. Rule 326 applies to all cases whether tried by a Judge, jury, or otherwise, in which the judgment is pronounced by the Court or a Judge in Court, and Rule 327 applies to cases in which the judgment has not been pronounced by the Court or a Judge in Court.

Where the judgment pronounced by the trial Judge upon the verdict of a jury was varied by a Divisional Court,

Held, that judgment should be entered as of the date on which the Divisional Court pronounced judgment.

Folinsbee, for the plaintiff.

Aylesworth, for the defendants.

[STREET, J., 9TH FEBRUARY, 1888.

In re HOOPER AND ERIE & HURON R. W. CO.

Railway company—Notice of expropriation—Desistment.

A railway company at different times served H. with three several notices under the Dominion Railway Act, stating that portions of land owned by him were required for the company's line. To each of the first two notices H. replied by a notice appointing an arbitrator, but stating such appointment to be expressly without prejudice to his right to insist that the company had no right to take any part of his land. The company served successive notices of desistment from all their three notices, and H. gave notice that he objected to the third notice of desistment, and claimed that the company had no right to desist from their third notice of expropriation.

Held, that the company had not exhausted their powers of desistment, but had the right to desist from their third notice. H. could not be allowed to complain of the abandonment by the company of proceedings to compel him to

sell his land to them when he had notified them at every opportunity that he intended to contest their right to compel him to do so; after they had acted upon his expressed intention and abandoned the notice to which he objected, it was too late for him to endeavour to insist upon its validity.

Grierson v. *Cheshire Lines Committee*, L. R. 19 Eq. 83, referred to.

Wm. Macdonald, for the land-owner.
Lash, Q.C., for the railway company.

[10TH FEBRUARY, 1888.

REGINA v. GREEN.

Criminal law — Conviction for selling intoxicating liquor to an Indian— Variance as to date between evidence and conviction—R. S. O. c. 43, s. 87 —Findings of magistrate, when reviewable.

A summary conviction by the Police Magistrate of the county of Brant for selling intoxicating liquor to an Indian in the township of Tuscarora, contrary to R. S. C. c. 43, stated that the offence was committed on the 29th September, 1887, but the information stated and the evidence disclosed that the offence was committed on the 27th September, 1887.

Held, that the date was not under the circumstances material, there being no suggestion that any wrong or injustice was caused by the mistake; and that s. 87 of R. S. C. c. 43 operated to cure this irregularity, as also certain other irregularities complained of, the offence having been clearly proved, the Police Magistrate having express jurisdiction by s. 96 of the Act, and the punishment imposed being within the power conferred upon him.

Held, also; that where the proceedings before a magistrate are removed under 29 and 30 V. c. 45, s. 5, the Judge is not to sit as a court of appeal from the findings of the magistrate upon the evidence; if any fact found by the magistrate is

disputed and he would have no jurisdiction had he not found that fact, then the evidence may be looked at to see whether there was anything to support his finding upon it ; but if the jurisdiction to try the offence charged does not come in question as a part of the evidence, then the jurisdiction having attached, his finding is not reviewable as a general rule except upon an appeal.

Mackenzie, Q.C., for the defendant.
Aylesworth, for the Magistrate.

[MACMAHON, J., 10TH FEBRUARY, 1888.

REGINA v. DALY.

Criminal law—Conviction for vagrancy—Nature of offence.

The Act R. S. C. c. 157, s. 8 (f.), provides that " all persons who cause a disturbance in any street or highway by screaming, swearing, or singing, or by being drunk, or by impeding or incommoding peaceable passengers * * are loose, idle, or disorderly persons within the meaning of this section."

The defendant was convicted and committed for that he " unlawfully did cause a disturbance on a public street * * by being drunk, and then was a vagrant, loose, idle, and disorderly person within the meaning of the Act respecting vagrants."

The evidence disclosed that the defendant was drunk and that he was guilty of impeding and incommoding peaceable passengers, but it negatived his causing a disturbance in the street by being drunk.

Held, that no offence of the nature described in the conviction and commitment was committed by the defendant, and an order was made for his discharge.

Delamere, for the Crown.
Morson, for the defendant.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

CRAWFORD v. DUFFIELD.

Constitutional law—Law stamps—Provincial Legislature—Construction of statute.

A provincial statute provided that "all duties and fees of office payable in law stamps on any search, filing, pleading . . . in virtue of any statute, rule, or order, now or hereafter in force, are hereby declared to be a direct tax and duty imposed upon the party directed to pay or paying the same, in order to the raising of a revenue for provincial purposes, and shall not be in any way taxable or recoverable as costs by the said party from any other party or person whatsoever."

Held, (1.) That the Act was *intra vires* of the Legislature.

(2.) The words "now or hereafter in force" read as "which now or hereafter have been enacted or made, and remain unrepealed."

McMONAGLE v. ORTON.

Excessive damages—Jury fee.

In an action for assault, false imprisonment, slander, and libel, the assault and imprisonment consisted in the defendant putting his hand upon the plaintiff's shoulder, pushing

her into an office, and locking the door for a short time. No evidence was given of special damage under the slander and libel counts, and a verdict upon them alone could not therefore be supported. The jury gave a general verdict of $300.

Held, (1.) That although the damages were excessive the Court would not interfere with the verdict upon that account.

(2.) Although the jury fee might not have been paid because of the slander and libel counts, and although no evidence of the special damage was given under these counts, yet the general verdict would not for those reasons be set aside.

COMMERCIAL BANK v. TEES.

Promissory note—Presentment—Evidence.

In an action upon a promissory note the only evidence of presentment was that of various officials who testified to their ordinary course of business and duty with reference to the note.

Held, that although, under the authorities, evidence to prove presentment in that way was admissible, yet such proof might readily be rebutted, and there being some negative evidence the plaintiffs were non-suited, and that, although the merits seemed to be on the plaintiffs' side.

HARDIE v. LAVERY.

Court or Chambers—Motion to commit.

A motion to commit for breach of an injunction must be made in Court and not in Chambers.

[TAYLOR, C. J.

McLELLAN v. THE MUNICIPALITY OF ASSINIBOIA.

Tax sale—Action for not executing deed—Pleading.

A statute authorizing the sale of lands for taxes provided that the deeds "shall be executed by the reeve and treasurer, and under the seals of the said municipalities respectively." In an action for refusal to execute a deed to a purchaser the declaration alleged a demand upon the municipality.

Held, that the action would not lie; for the deed ought to be executed by the reeve and treasurer and not by the municipality.

Every count in a declaration must contain in itself a complete cause of action. And where several counts showed a cause of action in A., and at the foot of the declaration an assignment was alleged to the plaintiff of "all of the aforesaid causes of action, etc.,"

Held, that those words formed no part of the counts and could not be looked at upon demurrer to some of them.

[KILLAM, J.

BURROWS v. CAMERON.

Writ of summons—Cause of action not arising within jurisdiction—Affidavit—Positive statement.

In support of an application to set aside a writ of summons upon the ground that the cause of action arose out of the jurisdiction, the following affidavit was filed:—

"That I submit this Honourable Court has no jurisdiction whatever over the subject matter of this suit, or over myself or my co-defendant, on the ground amongst others that we are not resident within the jurisdiction of that Court, and that the plaintiff's cause of action, if any, arose within the

Province of Ontario, and not within the Province of Manitoba, and that the contract, if any, between Messrs. Kennedy, Blanchard, and McKay and my co-defendant and myself (which I deny), arose within the Province of Ontario, and not within the Province of Manitoba."

Held, that there was not in such affidavit any positive allegation that the cause of action did not arise within the jurisdiction, and that the writ should not be set aside.

[BAIN, J.

WEST v. LYNCH.

Specific performance or rescission—Pleading—Assignment of chose in action.

There is a distinction between a bill for specific performance and a bill asking that a time may be fixed for payment, and in default rescission.

The principle upon which the Court acts in decreeing cancellation of an agreement for the sale of land is practically the same as that on which foreclosure of a mortgage is decreed.

Consequently a bill for rescission may be filed for default in payment of an instalment, although the whole purchase money may not be due.

An agreement for the sale of land provided that upon default the vendor might re-enter or re-sell.

Held, that without exercising these powers the vendor might file a bill for rescission.

It is not necessary to allege that an assignment from a vendor of his interest in the property was in writing. When it is stated generally in a pleading that there is an agreement, or assignment, or other contract, and it does not appear on the face of the pleading that it is invalid, the Court will assume that it is valid.

Assignments of choses in action may in equity be by parol.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.] [8TH MARCH, 1888.

TEMPERANCE COLONIZATION SOCIETY v. EVANS.

Jury notice—Money demand—Equitable cause of action—Severing issues—Rule 256—Trial Judge—C. L. P. Act, s. 255.

The order of the Chancery Division, 12 P. R. 48; 7 C. L. T. Occ. N. 161, restoring the defendants' jury notice, which had been struck out, affirmed by this Court.

A. H. Marsh, for the appellants.

Hoyles and *A. D. Cameron*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION,

[THE DIVISIONAL COURT, 13TH DECEMBER, 1887.

DOBSON v. SOOTHERAN.

Landlord and tenant—Forfeiture of term by assignment—Overholding Tenants' Act—Notice.

S. and his partners were tenants of D. under a lease which provided that any assignment by the lessees for the general benefit of their creditors should forfeit the term. The lessees, at a time when two quarters' rent was overdue and in arrear, made such an assignment to C., who thereupon took possession of the premises, and shortly afterwards paid D. the two

quarters' arrears of rent. A few weeks later D. served on S. and his partners a demand of possession, and a notice of application to the Judge under the Overholding Tenants' Act, which S. handed to C., and C. appeared before the County Judge on the hearing of the application, and had himself added as a party to the proceedings.

On motion by C. in the High Court to set aside the proceedings,

Held, that the act of the lessees in making the assignment was an act whereby their tenancy was determined within the meaning of s. 2 of the Overholding Tenants' Act, and that C. having intervened in the proceedings could not object that no demand had been served on him.

Held, also, that the receipt, after the forfeiture, of the rent which had become due before, did not operate as any waiver thereof, and that a sufficient demand in writing of possession had been made upon C. by the landlord.

Aylesworth and *D. J. McIntyre*, for the motion.

Hudspeth, Q.C., contra.

[9TH MARCH, 1888.

COUSINEAU v. CITY OF LONDON FIRE INSURANCE CO.

Insurance — Fire—Conditions of policy—Limitation of action—Waiver — Estoppel by conduct—Special case stated—Vacating—Amendment.

The plaintiff sued upon an insurance policy for a loss occasioned by a fire which took place on the 28th March, 1886. One of the statutory conditions of the policy provided that every action thereunder should be absolutely barred unless commenced within one year after the loss occurred. The action was not commenced until the 11th July, 1887. After the plaintiff had put in proof papers in reference to the loss, the defendants from time to time up to the 11th May, 1887, requested the plaintiff to procure and furnish, and the plaintiff did procure and furnish, additional particulars concerning the claim, and the claim was completed more than sixty days prior to the commencement of the action, as re-

quired by one of the conditions in variation of the statutory conditions, which provided that the loss should not be payable until sixty days after the completion of the claim.

Held, *per* ARMOUR, C.J., that the conduct of the defendants in requesting the plaintiff to procure and furnish additional particulars, and thereby putting him to loss of time, trouble, and expense, was a waiver of and precluded the defendants from setting up the statutory condition limiting the time for bringing the action.

Per STREET, J., that, in the absence of any agreement not to insist upon the conditions, there could be no waiver unless the defendants had so acted as to estop themselves from taking advantage of the condition; there was nothing in the conduct of the defendants equivalent to an assertion on their part that they would not insist upon their rights under the condition; and the defendants were therefore entitled to the benefit of the condition.

Cornish v. *Abington*, 4 H & N. 548, and *Thomas* v. *Brown*, 1 Q. B. D. 714, discussed.

Held, also, *per* ARMOUR, C.J., that except by consent, affidavits could not be received to alter or modify a special case stated by consent; the only relief open to a party complaining that a case has been misstated is to apply to amend or vacate it; and *quære* whether it could be amended after judgment.

The two Judges who composed the Divisional Court at the hearing of this case disagreeing, the judgment of the trial Judge in favour of the plaintiff was not disturbed.

C. R. W. Biggar, for the plaintiff.

McCarthy, Q.C., and *C. Millar*, for the defendants.

O'BYRNE v. CAMPBELL.

Drainage—Ditches and Watercourses Act, 1883, s. 13—Award—Duty of township engineer—Damage to land—Proximate cause.

After the time fixed by an award under the Ditches and Watercourses Act, 1883, for the completion of certain drainage work by neighbouring land-owners, the plaintiff, who

was one of the parties interested in the award, in writing required the defendant, as township engineer, to inspect the work with the object of having it completed according to the award; but, as the plaintiff alleged, the defendant did not inspect the work or cause it to be completed according to the award, but neglected to do so, and thereby the provisions of the award were not carried out, and the plaintiff in consequence suffered damage by reason of water remaining on his land, etc.

Held, that the provision of s. 13 of the above Act as to the inspection by the engineer is imperative, and an action would lie for breach of his duty; but, even if the evidence had shewn such a breach, the damages claimed were not the proximate, necessary, or natural result thereof.

The other provisions of s. 13 are merely permissive, and no action would lie for their non-performance; nor, were it otherwise, could it be held that the damages claimed were the proximate result of such non-performance.

Those who, by the terms of the award, ought to have done the work, were the persons proximately responsible for the damages.

Wallace Nesbitt, for the plaintiff.
Idington, Q.C., for the defendant.

STALKER v. TOWNSHIP OF DUNWICH.

Municipal corporation—Pathmaster—Public duty—Private interest—R. S. O. (1877) c. 73, s. 1—Liability—Acquiescence by corporation—Compensation under Municipal Act—Assessment of damages.

A pathmaster is "an officer or person fulfilling a public duty" within the meaning of R. S. O. (1877), c. 73, s. 1, and for anything done by him in the performance of such public duty he is entitled to the protection of the statute; but where, professing to act as a public officer, he seeks to promote his private interest by some act, he disentitles himself to the protection of the statute, and may be proceeded against for such act as if he were a private individual.

And where a pathmaster of a township in the course of his employment so acted as to disentitle himself to the protection of the statute, and thereby caused damage to the plaintiff,

Held, that the township corporation as well as the path-master was liable; and even if not originally so, the corporation made itself liable by sanctioning what was done and refusing to amend it after notice.

Damage to land arising from an overflow of water caused by negligently diverting the water from its natural course without providing a sufficient outlet, is not the subject of compensation under the Municipal Act, 1883.

Since the O. J. Act damages should be asssessed up to the date of judgment.

W. R. Meredith, Q.C., for the plaintiff.

Lash, Q.C., and *Glenn*, for the defendants.

[ROSE, J., 3RD JANUARY, 1888.

REGINA v. CAMERON.

Canada Temperance Act, R. S. C. c. 106, s. 100—Power of magistrates to inflict greater penalty than $50—Reasonable discretion.

Under the Canada Temperance Act, R. S. C. c. 106, s. 100, convicting magistrates may inflict a reasonable penalty in excess of $50.

Remarks as to their discretion in so doing.

A penalty of $60 allowed to stand.

W. M. Douglas, for the defendant.

Delamere, for the magistrate.

[5TH JANUARY, 1888.

REGINA v. CLARK.

Canada Temperance Act—Insufficient proof of prior offences—Police magistrate—Separate commission for county and town—Jurisdiction—Adjournment.

The defendant was convicted of having sold intoxicating liquor contrary to the provisions of the Canada Temperance Act, the conviction stating that the defendant was formerly convicted of a first and second offence against the Act, and that this was the third offence. The certificate produced to prove the prior convictions simply stated that Elias Clark

was convicted as for a first and second offence against the Canada Temperance Act, 1878, setting forth the dates of the convictions, but not stating the nature of the offences, or whether against the first or second part of the Act.

Held, that there is no power to punish as for a third offence unless there have been two prior convictions for offences of the same nature, and as neither the record of conviction nor the evidence shewed this, the conviction must be quashed.

Semble, that if the conviction were well drawn, the similarity of name of the person mentioned in the certificate and the defendant would afford proof of identity.

The magistrate had a commission as a police magistrate for the county of Halton, and an independent and subsequent commission for the town of Oakville; and he took the information and part of the evidence at Georgetown, and then adjourned to Oakville, and subsequently from Oakville back to Georgetown, where he adjudicated upon the evidence and made the conviction.

Held, following *Regina* v. *Riley*, 12 P. R. 98, that the magistrate had jurisdiction to sit in Oakville; and he took the information and part of the evidence at Georgetown and then adjourned to Oakville, under his commission as police magistrate for the county, and he consequently had jurisdiction to adjourn as he did.

W. M. Douglas, for the defendant.

Delamere, for the magistrate.

[6TH JANUARY, 1888.

REGINA v. LANGFORD.

Magistrate—Interest of—Conviction for assault—Want of evidence.

The defendant was convicted of having unlawfully assaulted the complainant, who was the daughter of the convicting magistrate, where the only evidence was that the defendant had in company with S. gone to the complainant's house at about ten o'clock in the evening, and S. had knocked at the door and told the complainant that he desired to introduce the defendant, whereupon the complainant replied that they had come to insult her, and that she would have them both arrested in the morning.

Held, that there was no evidence of an assault, and the conviction must be quashed.

Held, also, that it was improper for the magistrate to sit and try the case, the complainant being his daughter, and that this also was a good ground for quashing the conviction.

W. M. Douglas, for the defendant.

Allan Cassels, for the magistrate.

[3RD MARCH, 1888.

GREENE v. WRIGHT.

Judgment—Motion under Rule 324—Material necessary.

In order to obtain, under Rule 324, a speedy judgment before the time for appearance in an action has expired, a plaintiff must shew that some injury or injustice is likely to happen or be done to him if he is not awarded immediate relief.

And where the affidavit of a plaintiff stated that he verily believed it was necessary for the plaintiffs to get immediate judgment in order to protect their interests and prevent any disposition of the estate that might be prejudicial to the creditors, but no facts were set out upon which such belief was founded, and the utmost shewn was that the defendant was in financial straits, and had refused to submit his affairs to investigation or to make an assignment;

Held, that a motion under Rule 324 for judgment before appearance must be refused.

B. E. Bull, for the plaintiff.

No one for the defendant.

[STREET, J., 27TH DECEMBER, 1887.

DAVIES v. CITY OF TORONTO.

Municipal corporation—Powers—Submission to electors of matters over which without assent of electors municipal council has jurisdiction—Injunction to restrain such submission.

The defendants' council passed through two readings, by-laws for the limitation of the number of tavern and shop licenses, under R. S. O. c. 181, ss. 17 and 24. Before the third reading the council passed a resolution authorizing the sub-

mission to the electors, contemporaneously with the general municipal elections, of the question whether such limitation was desirable or not, reserving, however, to the council the final decision upon the propriety of passing the by-laws. The council also passed a subsequent resolution authorizing the expenditure of $300 out of municipal funds in advertising a vote so to be taken. After the expenditure of the greater portion of the sum so voted, an action was brought by the plaintiff, on behalf of himself and all other ratepayers except the individual defendants, against the corporation and against the individual members of a sub-committee appointed by the council to superintend the advertising of the vote, and an *interim* injunction was moved for to restrain the defendants from submitting the question to the electors, and from printing the ballot papers, advertising the vote, or otherwise expending municipal moneys for the purposes contemplated by the resolutions.

Held, 1. That in so far as the application depended on the expenditure of municipal funds for an improper purpose, it was too late, the greater portion of the funds voted having already been expended, and that the plaintiff should be left to obtain such order for repayment to the city by the other defendants as he might appear entitled to at the trial.

2. That the taking of a vote without legislative authority upon a matter over which, without the electoral assent, the council had complete jurisdiction, should not be restrained, there being no express legislative prohibition, and the council having acted *bona fide*, unless some good reason were shewn for the conclusion that the result would be injurious or unjust to the corporation or some of its members, which was not shewn in this case.

Semble, that if the resolution had proposed to give to the result of the proposed vote a final and binding effect, thus substituting the direct decision of the electors for that of the council, the submission of the by-law to the vote of the electors would have been illegal and *ultra vires*, and would have been restrained.

Helm v. *Port Hope*, 22 Gr. 273, distinguished.

McCarthy, Q.C., *Osler*, Q.C., and *W. M. Douglas*, for the plaintiffs.

Foster, Q.C., *McWilliams*, and *Shepley*, for the defendants.

[3RD JANUARY, 1888.

In re OSTROM AND THE TOWNSHIP OF SIDNEY.

Municipal corporation—By-law to open road—Private interests—Consent of county council—Statutory notices.

The municipal council of S. passed a by-law to open a road east and west across four farm lots in the first concession of the township. A travelled road was already open from B. westward to the east end of the road to be opened under the by-law, at which point a side road ran north and south through the township. After crossing three lots the proposed new road would intersect another north and south side road, and crossing this side road it would extend westward across one more lot as a *cul-de-sac*. The applicant contended that this by-law was passed, not in the public interest, but to serve the private convenience of two landowners of the locality. It was in answer sworn by the members of the township council that they intended to complete the road as soon as possible across five more lots to the westward, until it would reach the next north and south side road through the township.

This explanation was accepted by the Court as answering any apparent presumption that the by-law was not passed in the public interest, as in this case none of the other circumstances were present which in other cases have led to the belief that private interests only were being considered in passing the by-law.

The proposed road was to be only forty feet in width. The authority of the county council in this behalf was not obtained until after the by-law had been passed, and this application to quash it made.

Held, that the consent of the county council, though a condition precedent to the laying out of the road, was not a condition precedent to the passing of the by-law.

The statutory notices of the proposed by-law described the road as intended to cross not only the four lots mentioned in the by-law, but also the five others next west of them.

Held, following *Re Baker and Saltfleet*, 31 U. C. R. 386, that this variance was not fatal to the by-law.

Aylesworth and *F. Wallbridge*, for the application.

W. H. P. Clement and *Flint*, contra.

[27TH FEBRUARY, 1888.

WICKENS v. McMEEKIN.

Principal and surety—Limited term of employment of principal—Subsequent extension—Construction of bond—Estoppel.

M. having been employed by the plaintiff as a sub-agent in the collection of money, etc., the defendants gave the plaintiff a bond to secure him against loss through M. The bond recited the appointment of M. and was conditioned that if M. should from time to time and at all times thereafter account and pay to the plaintiff, etc., and at all times during such period as he should act as agent, etc., pay all sums received, etc., to the plaintiff, then the obligation to be void. M.'s appointment was made before the date of the bond and was only till the 31st December, 1884, but the defendants were not aware when they executed the bond, nor at any time afterwards till the trial of this action, that M.'s appointment was for a limited time. M. by subsequent arrangement continued to act as agent after the year 1884, and the only defalcations committed by him were in November and December, 1886.

Held, notwithstanding the want of knowledge on the part of the sureties, that the appointment recited in the bond must be taken to have referred to the appointment made before its date; and that the creditor and the principal could not, by an arrangement made after the liability of the sureties was created, be allowed to extend that liability beyond the period which originally formed its limit. The words found in the condition which would apply to the extended period did not justify the position that the sureties must have contracted with a view to a subsequent extension.

A letter was written by one of the sureties to the plaintiff on 17th December, 1887, in which he notified the plaintiff that from that date he withdrew from his suretyship.

Held, that this could not estop the surety from denying his liability; and even if it was to be read as shewing that the surety assented to the continuation of the employment of M., it was immaterial.

Kitson v. *Julian*, 4 E. & B. 854, and *Sanderson* v. *Aston*, L. R. 8 Ex. 73, followed.

Robinson, Q.C., and *T. P. Galt*, for the plaintiff.

Moss, Q.C., and *A. D. Cameron*, for the defendants.

[9TH MARCH, 1888.

BEECHARD v. MERRIFIELD.

Report—Motion for judgment on—Waiver of right to appeal from.

The plaintiff served notice of motion for judgment upon the report of a referee; after which the defendant served a cross-notice returnable at the same time by way of appeal from the report; whereupon the plaintiff also served notice of appeal from the report returnable at the same time.

On the return day *Hoyles*, for the defendant, objected that the plaintiff by moving for judgment on the report had adopted it, and waived his right of appeal from it; the plaintiff must either approbate or reprobate.

E. T. English, for the plaintiff, contra.

STREET, J., held that the objection was well taken; but allowed the plaintiff to abandon his notice of motion for judgment on the report. Costs to defendant in any event.

[MACMAHON, J., 16TH DECEMBER, 1887.

REGINA v. SANDERSON.

Coroner—Evidence—Discrediting witness at inquest—R. S. C. c. 174, s. 234—Crown Attorney—Right to enter jury room.

At a coroner's inquest evidence is properly receivable under R. S. C. c. 174, s. 234, that a witness at such inquest has made at other times a statement inconsistent with his present testimony; and independently of that enactment the improper reception of evidence is no ground for a *certiorari* to bring up the coroner's inquisition.

Regina v. *Ingham*, 5 B. & S. at p. 260, specially referred to.

It is not improper for the County Crown Attorney, acting for the prosecution, to enter the jury room, with the consent of the coroner, after the jury have reached a conclusion, where the object of the Crown Attorney is to advise the jury as to the proper language to be employed in order to draw their verdict after it has been arrived at.

J. L. Murphy, for the defendant.

E. F. B. Johnston, for the Attorney-General.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 21ST FEBRUARY, 1888.

GALL v. COLLINS.

Costs—Taxation—Solicitor's lien on fund—Locus standi of attacking creditor—Solicitor's negligence—Discretion of taxing officer—Certificate of taxation.

G., a judgment creditor of W. A. C., garnished a fund recovered by J. W. C. suing as the assignee of W. A. C. G. disputed the validity of the assignment from W. A. C. to J. W. C., and an issue was directed to be tried between G. and J. W. C. as to the portion of the fund which would remain after satisfying the claim of the solicitor of J. W. C. who had a lien upon the fund for his costs incurred in the recovery of it. Upon appeal from the taxation of these costs, before the trial of the issue,

Held, that G. had the right to be represented upon the taxation and appeal, as in one event he had an interest in the reduction of the solicitor's bill, and there could not be two taxations, one as against J. W. C., and the other as against G. if he succeeded in the issue.

The Court refused to interfere with the discretion of the taxing officer in allowing certain costs to the solicitor of proceedings which had been set aside in the action as irregular, and as to which G. alleged negligence and want of skil

An informal certificate of taxation was written at the end of the bill of costs, shewing that it was taxed at so much, initialled by the taxing officer, and marked "filed" in his office.

Held, that this was not a sufficient filing of a certificate of taxation, for the purposes of appeal, to satisfy the rule laid down in *Langtry* v. *Dumoulin*, 10 P. R. 244.

McCallum v. *McCallum*, 11 P. R. 179, distinguished.

Middleton, for the judgment creditor.

A. M. Grier, for the solicitor.

Hands, for the client.

MACLENNAN v. GRAY.

Appeal from Master's ruling—Time—Reading depositions taken on former application.

An appeal from the ruling of a Master in the course of a reference should be brought on within a month from the date of the ruling, irrespective of the date of the certificate of such ruling.

In a mortgage action there was a reference to a Master for sale, etc. After sale and satisfaction of the plaintiff's claim out of the proceeds, a balance remained in Court, which R. G. applied to the Master to have paid out to her. Upon such application R. G. was examined before the Master, who refused the application. An order was afterwards made by a Judge referring to the Master to ascertain who was entitled to the fund and to settle priorities. Upon such reference the Master ruled that the depositions of R. G. taken upon the former application could be read.

Held, reversing the decision of ROBERTSON, J., in Chambers, that the depositions could be read subject to the right of an opposing claimant of the fund to cross-examine R. G. upon them; R. G. to attend for cross-examination upon payment of conduct money by the other claimant.

A. C. F. Boulton, for the defendant Rosanna Gray.

Middleton, for the defendant Allen.

[27TH FEBRUARY, 1888.

In re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition.

The order of FERGUSON, J., 12 P. R. 312; 7 C. L. T. Occ. N. 477, was affirmed with one variation; viz., the *habeas corpus* is to run concurrently with the petition directed to be filed, and to be disposed of with it.

J. Maclennan, Q.C., and *H. J. Scott*, Q.C., for the appeal.
S. H. Blake, Q.C., and *H. Cassels*, contra.

[PROUDFOOT, J., 9TH NOVEMBER, 1887.

ROBERTS v. McDONALD.

Mechanic's lien—Registered claim—Necessary statements—Pleading.

Where in an action to enforce a mechanic's lien the plaintiff purported to set out on his statement of claim the registered lien verbatim, and the same as set out did not shew that the work was done and the material furnished within thirty days before the registration of the lien, nor the amount due,

Held, on demurrer, bad; but leave given to amend.

J. H. Ferguson, for the demurrer.
Kappele, contra.

IN CHAMBERS.

[FERGUSON, J., 2ND MARCH, 1888.

DUFRESNE v. DUFRESNE.

Lunatic—Maintenance of infant children of.

Middleton, for the curatrix o an interdict under the laws of the Province of Quebec, applied for payment out of the moneys of the interdict in Court of an allowance for the maintenance of his infant children resident in Ontario.

Hoyles, contra.

FERGUSON, J., dismissed the motion on the ground that the Court has no jurisdiction to make an allowance for the maintenance of the children of a person owning money in Court, except that conferred by the statute R. S. O. (1877) c. 40, ss. 66-72, and as in this case the interdict had not been declared a lunatic under the provisions of that Act, it did not apply.

[ROSE, J., 24TH FEBRUARY, 1888.

HARDY v. PICKARD.

Costs—Omission to order at trial—Subsequent order—Rule 338.

The trial Judge reserved judgment, and afterwards delivered a written judgment in the plaintiff's favour, but inadvertently omitted to make any order as to costs.

Held, that the case came within Rule 338, and that the Judge had power, even after an appeal to a Divisional Court which left his judgment undisturbed, to make an order as to costs.

Fritz v. *Hobson*, 14 Ch. D. 542, followed.

R. A. Dickson, for the plaintiff.

W. M. Douglas, for the defendants.

[28TH FEBRUARY, 1888.

GODSON v. TOWN OF PARKDALE.

Judgment—When time for appealing from begins to run.

This action was tried without a jury at the Toronto Assizes on 25th October, 1887, by GALT, C.J., who reserved judgment, and on the 30th November, 1887, handed out his written opinion or judgment in favour of the plaintiff to the Clerk of Assize, and on the same day indorsed his findings on the record. Judgment, however, was not formally entered up until the 7th January, 1888.

On the 30th January, 1888, the defendants the Grand Trunk Railway Company gave notice of their intention to appeal from the judgment to the Court of Appeal. On the 11th February, 1888, they made application for leave to pay into Court $400 as security for the costs of the appeal. This motion was on 14th February, 1888, dismissed by the Master in Chambers, he being of the opinion that there was no appeal pending, inasmuch as the notice of appeal was not served within thirty days after the 30th November, 1887.

From this order the Grand Trunk Railway appealed to a Judge in Chambers.

H. Cassels, for the appeal.

T. P. Galt, contra.

ROSE, J., affirmed the Master's order with costs, holding that the indorsement by the trial Judge of his findings upon the record was the judgment referred to in section 38 of the Ontario Judicature Act, and that the railway company had therefore served their notice of appeal too late.

MILLER v. MILLER.

Order for interim alimony—Registration—Lien on land—Subsequent execution.

An order for payment of *interim* alimony and *interim* disbursements was obtained by the plaintiff in an action for alimony, and was registered against the lands of the defendant. The plaintiff failing to realize anything upon execution against the goods of the defendant, obtained an order for sale of the lands to satisfy the *interim* alimony and disbursements which the defendants had been directed to pay. The lands were sold under this order, and the purchase money paid into Court. The solicitors of the defendant had meanwhile obtained a judgment against him for their costs of defence, and placed a *fi. fa.* lands in the sheriff's hands, but after the registration of the order. The purchase moneys were insufficient to satisfy both claims, and were not even sufficient to pay the plaintiff the amount awarded her and her costs of sale.

Hoyles, for the plaintiff and purchaser, now moved for payment out to the former of the moneys in Court, to apply on her claim for *interim* alimony and disbursements under the order, and her costs of sale, and for a vesting order for the latter free from the execution of the defendant's solicitors.

C. J. Holman, for the solicitors, contra, contended that the plaintiff and the execution creditors whom he represented should share ratably the proceeds of the sale. S. 44 of the Court of Chancery Act, R. S. O. (1877), c. 40, provides that an order or decree for alimony may be registered, and that registration is to operate against the lands in the same manner as the registration of a charge of a life annuity; if that applied to orders for *interim* alimony, the plaintiff would no doubt have a lien which would defeat the solicitors' execution; but the words "order or decree" do not include an order for *interim* alimony.

Hoyles, in reply. In *Holmested's* R. & O. vol. 1, p. 294, it is said that an order for *interim* alimony and disbursements may be registered, and s. 44 of R. S. O. c. 40, is referred to.

ROSE, J., made the order asked by the plaintiff, holding that the order was properly registered, and when registered operated as a lien, and was not defeated by a subsequent execution.

[2ND MARCH, 1888.

YORK v. McKELLAR.

Venue—Preponderance of convenience.

An appeal by the plaintiff from an order of the Master in Chambers changing the place of trial from Ottawa to Sandwich.

The plaintiff and defendant at the time the cause of action arose both lived at Sandwich, but the plaintiff subsequently moved to Ottawa, and retained a solicitor living there to bring this action, in which the venue was laid at Ottawa. The action was for the value of work done for the defendant, according to a contract.

The defence denied the contract. The plaintiff had two witnesses in Ottawa—himself and his wife. The defendant swore that he had ten witnesses in Sandwich. The plaintiff challenged this statement, contending that it was impossible it should be so, but he did not cross-examine the defendant on his affidavit or contradict it.

C. Millar, for the appeal, relied on the right of the plaintiff to name the place of trial, and cited *Slater* v. *Purvis*, 10 P. R. 604.

Aylesworth, contra, was not called upon.

ROSE, J., said that in *Slater* v. *Purvis* he had stretched the right of the plaintiff to name the place of trial to its utmost limit; he certainly would not extend it. There was a great preponderance of convenience in favour of Sandwich as the place of trial, and he did not think that because the plaintiff had left Sandwich and gone to live in Ottawa he should be allowed to drag the defendant after him. The order must be affirmed.

[STREET, J., 7TH FEBRUARY, 1888.

BANK OF HAMILTON v. BAINE.

Reference—C. L. P. Act, s. 197—Powers of local Master—Absconding Debtors' Act, ss. 8, 9.

Local Masters have no greater powers in matters coming before them in Chambers under the jurisdiction given them by the Ontario Judicature Act and 48 V. c. 13, s. 21, than those conferred upon the Master in Chambers, and from those powers the power of referring causes under the Common Law Procedure Act is excepted. A local Master has therefore no power to make an order to proceed against an absconding debtor upon default, after service of the writ of attachment, where such order contains a clause directing a reference under s. 197 of the Common Law Procedure Act. It is intended by ss. 8 and 9 of the Absconding Debtors' Act that only one order shall be made under which the plaintiff may proceed to judgment, and therefore where an order of reference is necessary, the order to proceed must be made by a Judge who has jurisdiction to refer causes. The expression

"the referring of causes under the Common Law Procedure Act" is not restricted to causes which have been begun by writ of summons.

Watson, for the plaintiffs.
Aylesworth, for the defendant.

[25TH FEBRUARY, 1888.

INTERNATIONAL WRECKING CO. v. MURPHY.

Company—Shareholders—Use of corporate name in litigation.

A corporation has the same right as an individual to withdraw its name from litigation to which it has been made a party plaintiff, but of which it does not approve. The company itself is the proper plaintiff in actions for injury to the corporate property, and such an action by shareholders alone, showing no reason why the company had not instituted the proceedings, could not be sustained.

But where the complaint was that a majority of the shareholders had obtained possession of the company's name and the control of its affairs, and were using it improperly for their own benefit, and causing injury to the company's property,

Held, that an action could be sustained in the name of one or more shareholders, on behalf of themselves and all others except the defendants, against the company and the majority of the shareholders.

C. J. Holman, for the plaintiffs.
Hoyles, for the defendants.

BLAKE v. TORONTO BREWING AND MALTING COMPANY.

Costs, scale of—Interlocutory motions—"In any event."

Upon three interlocutory applications made in this action, which was brought in the High Court of Justice, orders were made giving the plaintiff costs "in any event of the action." The plaintiff succeeded upon the final determination of the action, but was awarded costs of the action upon the County

Court scale only. The taxing officer ruled that the plaintiff's costs of the interlocutory applications should be taxed on the County Court scale, as well as the general costs of the action.

W. J. Nelson, for the plaintiff, appealed from this ruling, referring to *Cameron* v. *Campbell*, 1 P. R. 170.

Kappele, for the defendants.

STREET, J., held that the taxing officer was right in taxing these costs on the County Court scale.

ROBERTSON v. LAIRD.

Discontinuance by plaintiff—Effect of upon defendant's appeal.

The Master in Chambers dismissed a motion made by the defendant Laird to vacate the registration of a *lis pendens* upon his lands, and the defendant appealed to a Judge in Chambers.

Upon the return of the notice of appeal the plaintiff objected that there was no jurisdiction to hear the appeal, the plaintiff having served a notice of discontinuance since the order of the Master.

Arnoldi, for the plaintiff, referred to *Conybeare* v. *Lewis*, 13 Ch. D. 469.

Hoyles, for the defendant Laird, referred to the 6th ed. of *Daniell's* Chy. Pr., p. 565; and to the 5th ed. of the same work, p. 690.

STREET, J., distinguished *Conybeare* v. *Lewis*, saying that there the plaintiff had put an end to his own appeal by discontinuing; but he could not by giving a notice of discontinuance take away a right which the defendant had acquired. The notice of discontinuance was similar to the old Chancery practice under which the plaintiff could on præcipe dismiss his own bill with costs. As shewn by the passage cited from the 5th ed. of *Daniell*, the defendant ought not to be deprived of his right of appeal by an *ex parte* order.

Supreme Court of Canada.

QUEBEC.]

BENDER v. CARRIERE.

Executory contract—Non-fulfilment of—Action for price—Temporary exception—Incidental demand—Damages—Cross-appeal.

In March, 1883, B. contracted with C. *et al.* for the delivery of an engine, in accordance with the Herreshoff system, to be placed in the yacht *Ninie*, then in course of construction. The engine was built, placed in the yacht, and upon trial was found defective. On the 31st August C. *et al.* took out a "*saisie conservatoire*" of the yacht *Ninie* and claimed $2,199.37 for the work and materials furnished. B. petitioned to annul the attachment and pleaded that the amount was not yet due, as C. *et al.* had not performed their contract, and by incidental demand claimed a large amount. After various proceedings the "*saisie conservatoire*" was abandoned, and the Court of Queen's Bench, on an appeal from a judgment of the Superior Court in favor of B. both on the principal action and incidental demand, ordered that experts be named to ascertain whether the engine was built in accordance with the contract and report on the defects. A report was made, by which it was declared that the contract was not carried out by C. *et al.* and that work and materials of the value of $225 were still necessary to complete the contract.

On motion to homologate the expert's report, the Superior Court was again called upon to adjudicate upon the merits of the demand in chief and of the incidental demand, and that Court held that, as C. *et al.* had not built an engine as covenanted by them, B.'s plea should be maintained, but as to incidental demand held the evidence insufficient to warrant a judgment in favour of B. On appeal to the Court of Queen's Bench that Court taking into consideration the fact that the yacht had since the institution of the action been sold in another suit at the instance of one of B.'s creditors, and purchased by C. *et al.*, the proceeds being deposited in Court to be distributed amongst B.'s creditors, credited B. with $225 necessary to complete the

engine, and $750 damages on B.'s incidental demand, and gave judgment in favour of C. *et al.* for the balance, viz., $1,215, with costs.

The fact of the sale and purchase of the yacht subsequent to the institution of the action did not appear on the pleadings.

On appeal to the Supreme Court of Canada and cross-appeal as to the amount allowed on incidental demand by the Court of Queen's Bench, it was

Held, reversing the judgment of the Court of Queen's Bench, RITCHIE, C.J., and TASCHEREAU, J., dissenting, that as it was shewn that at the time of the institution of C.'s action it was through faulty construction the engine and machinery therewith connected could not work according to the Herreshoff system, on which system C. *et al.* covenanted to build it, their action was premature.

Held, also, that the evidence in the case fully warranted the sum of $750 allowed by the Court of Queen's Bench on B.'s incidental demand, and therefore he was entitled to a udgment for that amount on the incidental demand, with costs.

TASCHEREAU, J., was of opinion on the cross-appeal that B.'s incidental demand should have been dismissed with costs.

Amyot, for the appellant.

Bosse, Q.C., for the respondents.

LABELLE v. CITY OF MONTREAL.

Damages-- Art. 1056, C. C.—Solatium—Cross-appeal, no notice of.

In an action of damages brought against the corporation of the city of Montreal, by the descendant relations of L., who was killed while driving down St. Sulpice street, alleged to have been at the time of the accident in a bad state of repair, by being thrown from the sleigh on which he was seated against the wall of a building, the learned judge before whom the case was tried without a jury, awarded the plaintiffs $1,000 damages, on the ground that they were entitled to such sum by way of solatium for the bereavement suffered on account of the premature death of their father.

Held, reversing the Court below, that the judgment could not be affirmed on the ground of solatium ; and as the respondents had not given notice of a cross-appeal to sustain the verdict on the ground that there was sufficient evidence of pecuniary loss for which compensation might be claimed, the action must be dismissed with costs.

Canadian Pacific R. W. Co. v. *Robinson*, 14 S. C. R. 105, followed.

Mathieu, for the appellants.
Stephens, for the respondents.

CHAUSSE v. STEPHENS.

Negligence—Elevator—Liability of master for fault of servant—Damages—Art. 1054, C. C.—Vindictive damages—Misapplication of term—Cross-appeal, no notice of.

On the 13th April, 1883, C., an architect, who had his office on the third flat of a building, known as the "Ottawa Building" in the city of Montreal, in which the landlord had placed an elevator for the use of the tenants, desiring to go to his office went towards the door of the elevator, and seeing it opened, he advanced to enter, but in lieu of putting his foot on the floor of the elevator, which was not there, he fell into the cellar and was seriously injured. In an action brought by C. against R. the landlord, claiming $15,000 damages for the suffered injury and loss, it was proved at the trial that the boy, an employee of R., in charge of the elevator at the time of the accident, had left it with the door open to go to his luncheon, leaving no substitute in charge. It was shown also that C. had suffered seriously from the fracture to his skull, had been obliged to follow for many months an expensive medical treatment, and had become almost incapacitated for the exercise of his profession. C. had been in the habit of using the elevator during the absence of the boy. The trial judge awarded C. $5,000 damages, and on appeal to the Court of Queen's Bench (appeal side), P. Q., that amount was reduced to $3,000, on the ground that C. was not entitled to vindictive damages.

On appeal to the Supreme Court of Canada;

Held, affirming the judgment of the Court below, that R. was liable for the fault, negligence, and carelessness of his employee (Art. 1054, C. C.), and that the amount awarded was not unreasonable.

Held, also, that though the sum of $5,000 awarded in a case like the present could not be said to include vindictive damages, the judgment of the trial Judge could not be restored, there being no cross-appeal.

Carter, for the appellant.

St. Pierre, for the respondent.

In re MONTMORENCY DOMINION ELECTION PETITION.

CAUCHON v. LANGELIER.

Elections—Dominion Controverted Elections Act, R. S. C. c. 9, s. 50—Supreme Court of Canada—Order on motion to dismiss petition for want of prosecution not appealable.

On the 23rd April, 1887, an election petition was duly presented to set aside the election of the respondent as a member of the House of Commons for the Electoral District of Montmorency. The trial of the petition was fixed by order of a Judge for the 22nd of October, but was not proceeded with. On the 16th December application was made by the respondent to the Court to have the petition declared abandoned on the ground that six months had elapsed since the petition had been presented, and that the trial had not been commenced, as required by the Dominion Controverted Elections Act, R. S. C. c. 9, s. 32. This application was granted by the Court, and the election petition was dismissed. On appeal to the Supreme Court of Canada it was

Held, FOURNIER and HENRY, JJ., dissenting, that neither s. 50, nor any other provision of the Dominion Controverted Elections Act, authorized an appeal from such an order or judgment, and therefore the present appeal should be quashed with costs for want of jurisdiction.

A. Ferguson, for the appellant.

A. F. McIntyre, for the respondent.

[In the *L'Assomption Election Case*, where the judgment appealed from was the decision of a Judge refusing to set aside the election petition on the ground that the trial had not been proceeded with within six months from the date of its presentation, and there was a subsequent judgment of the Court setting aside the election on the admitted acts of corruption by agents, it was also

Held, that the Supreme Court of Canada had no jurisdiction to entertain the appeal.]

In re QUEBEC COUNTY DOMINION ELECTION PETITION.

O'BRIEN v. CARON.

Elections—Petition—Judgment on motion to dismiss not appealable—R. S. C. c. 9, s. 33.

The election petition in this case was presented on the 9th April, 1887. On the 12th September an application was made to a Judge in Chambers to have the case fixed for trial, and the trial was fixed for the 31st October at Quebec, on which day it was continued by consent to the 19th December. On the last mentioned day the respondent moved the Court to dismiss the petition on the ground that the petitioners had not proceeded to trial within six months from the presentation of the petition. On the 26th December Caron, J., dismissed it without costs. On appeal to the Supreme Court of Canada it was

Held, FOURNIER and HENRY, JJ., dissenting, that the Supreme Court of Canada had no jurisdiction to entertain an appeal from the judgment; following the *Montmorency Case*, *supra*.

Per HENRY, J., affirming the judgment below, that as the petitioners had not made an application supported by affidavit to enlarge the time for the commencement of the trial, as provided in R. S. C. c. 9, s. 33, the election petition was properly dismissed.

McDougall, Q.C., and *Martin*, for the appellant.

Bosse, Q.C., for the respondent.

In re MONTMAGNY DOMINION ELECTION PETITION.

Elections—R. S. C. c. 9, s. 11—Defective service of election petition—Art. 67, C. C. P.—Preliminary objection.

The service of an election petition made in the Province of Quebec, at the defendant's law office, situated on the ground floor of his residence and having a separate entrance, by delivering a copy thereof to the defendant's law partner, who was not a member of and did not belong to the defendant's family, was not a service within R. S. C. c. 9, s. 11, and Art. 57, C. C. P., and a preliminary objection setting up such defective service was maintained and the election petition dismissed; GWYNNE, J., dissenting.

Belcourt, for the appellant.

Belleau, for the respondent.

NEW BRUNSWICK.]

SNOWBALL v. RITCHIE.

Boundary—Dispute as to—Reference to surveyors—Duties of surveyors under reference.

R., who held a license from the Government of New Brunswick to cut timber on certain Crown Lands, claimed that S., the licensee of the adjoining lots, was cutting on his grant, and he issued a writ of replevin for some 800 logs, alleged to have been so cut by S. The replevin suit was settled by an agreement between the parties to leave the matter to surveyors to establish the line between the two lots, the agreement providing that "the lines of the land held under said license (of R.) shall be surveyed and established by (naming the surveyors) and the stumps counted, etc."

Held, reversing the judgment of the Court below, that under this agreement the surveyors were bound to make a formal survey, and could not take a line run by one of them at a former time as the boundary line.

G. F. Gregory, for the appellant.

C. W. Weldon, Q. C., for the respondent.

GEROW v. PROVIDENCE WASHINGTON INS. CO.

Insurance—Marine—Voyage insured—Port on western coast of South America—Deviation—Question for jury.

A marine policy insured the ship *Minnie H. Gerow* for a voyage from Melbourne, Australia, to Valparaiso for orders, thence to a loading port on the western coast of South America, and thence to a port of discharge in the United Kingdom.

The ship went from Valparaiso to Lobos, an island from 25 to 40 miles off the western coast of South America, and after sailing from there was lost. In an action on the policy,

Held, reversing the judgment of the Court below, that whether or not Lobos was a port on the western coast of South America within the meaning of the policy, was a fact to be determined by the jury, and the judge not having left it to the jury, a new trial was ordered on the ground of misdirection.

J. Straton, for the appellants.

C. W. Weldon, Q.C., and *Palmer*, for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION,

[IN BANC, 9TH MARCH, 1888.

REGINA v. BUSH.

Constitutional law—Appointment of magistrates by Lieutenant-Governor of Province—Powers of Provincial Legislature—B. N. A. Act, ss. 91, 92—48 V. c. 17 (O.)

The Crown has the prerogative right to appoint Justices of the Peace within the Dominion of Canada and each of its Provinces; but it derogated from that right by assenting to the B. N. A. Act, which conferred upon either the Parliament

of Canada or the Legislatures of the Provinces the power to pass laws providing for the appointment of Justices of the Peace.

Such laws are in relation to the administration of justice, and upon the proper construction of ss. 91 and 92 of the B. N. A. Act, are exclusively within the power of the Provincial Legislatures, under s. 91, para. 14.

Additional weight is given to the construction placed upon these sections, by the Parliament of Canada having from time to time since the B. N. A. Act passed laws recognizing the right assumed by the Provincial Legislatures to pass such laws, and the appointments made under them.

An order *nisi* to quash a conviction made by a Police Magistrate appointed by the Lieutenant-Governor of Ontario under 48 V. c. 17 (O.), on the ground that such statute is *ultra vires*, was therefore discharged with costs.

A. H. Marsh, for the defendant.

Irving, Q.C., and *Moss*, Q.C., for the Attorney-General of Ontario.

Delamere, for the Magistrate.

[THE DIVISIONAL COURT, 9TH MARCH, 1888.

BANK OF HAMILTON v. BAINE.

Absconding debtor—Successive applications for writ of attachment—Fact of prior application not disclosed—Cause of action—Particularity in stating.

An application was made to a County Judge for an order to issue a writ of attachment under the Absconding Debtors' Act; the Judge did not finally determine against the application, but gave leave to renew it upon a further affidavit.

Held, that there was no reason why the application should not afterwards be made to another Judge.

Semble, also, that where a Judge refuses to grant an attachment or an order to hold to bail, successive applications may be made to successive Judges upon the same material, and an order granted by any one of them will be as valid as if it had been made by the first one; but in the case of a subsequent application upon the same or different material, the

Judge should always be informed of every previous application; this, however, is more a matter of propriety than of legal right, and an omission to do so would not be a ground for setting aside the order, if the material warranted the granting of it.

Held, also, that the same particularity in stating the cause of action is not required when a Judge has to make an order for a writ of attachment or to hold to bail, as was required in an affidavit to hold to bail when no order of a judge was required, nor as when personal liberty is involved.

McCarthy, Q.C., for the plaintiffs.

Aylesworth, for the defendant.

ONTARIO LOAN AND DEBENTURE CO. v. HOBBS.

Landlord and tenant—Mortgage—Re-demise clause, construction of—Creating tenancy—8 Anne c. 14, s. 1.

In a mortgage of lands under the Short Forms Act there were the usual covenants and provisos, except the attornment clause and the provisos, that the mortgagee may distrain for arrears of interest, and that until default the mortgagor shall have quiet possession, which were omitted, and there was a re-demise clause setting out that the mortgagees leased the mortgaged lands to the mortgagor from the date of the mortgage until the date provided in it for the last payment, the mortgagor paying in every year during the term, on each of the days appointed for payment by the redemption clause, such rent or sum as should equal the amount payable on such days according to such clause, such payments to be taken to be in satisfaction of the moneys payable under such clause. There was no other provision in the mortgage which could be taken as creating a tenancy.

Held, that under the mortgage, without the re-demise clause, the mortgagor upon the execution of the mortgage became at most a tenant by sufferance; and the re-demise clause was void as a lease or as creating a tenancy, because it was for the whole term of the mortgagees' interest, and because, being for a longer term than three years, it was not by deed, the mortgage not having been executed by the

mortgagees. As the mortgagor did not enter under the void lease, being already in possession, he could not be regarded as a tenant at will whose tenancy had been changed into one from year to year by virtue of payments made according to the intended lease, but must be considered as a mortgagor in possession.

Properly construed, the re-demise clause was merely a provision that the mortgagor should remain in possession until default.

Held, also, upon the evidence, that the relationship of landlord and tenant was never intended to be created in reality; and, not having been technically created, there was no tenancy in law or in fact, at a rent reserved, such as would, under 8 Anne, c. 14, s. 1, entitle the mortgagees, as to goods seized upon the lands in question, to a preference over other creditors of the mortgagor.

Becher, Q. C., for the plaintiffs.
Gibbons, for the defendants.

KENNEDY v. OLDHAM.

Specific performance—Contract for sale of land—Statute of Frauds—Written offer by purchaser not addressed to vendor—Contract completed by correspondence and initials on offer book.

An offer to purchase land was written and signed by the defendant in an offer book kept by a firm of land agents who were authorized by the plaintiff to sell the land, and was verbally accepted by the agents. The offer was not addressed to anyone, but the book was marked on the back with the initials of the agents. Previous to this offer letters had been written between the defendant and the agents in which an offer at a lower price was made and refused for the same land. After the second offer was accepted the defendant's solicitors corresponded with the agents of the plaintiff about the title, referring in their first letter to the land which the defendant had purchased from the agents.

Held, that the initials on the book might be read into the offer to supply the name of the vendor, and that these with

the correspondence constituted a sufficient agreement within the Statute of Frauds to bind the defendant.

Lefroy, for the plaintiff.

J. Maclennan, Q.C., and *D. Urquhart*, for the defendant.

In re JOHNSON v. THERRIEN.

Prohibition—Division Court—Judgment against garnishee—Proof of amount due—49 V. c. 15, s. 12—Money paid into Court.

Held, reversing the decision of STREET, J., in Chambers, that a Judge of a Division Court has no jurisdiction to give judgment against a garnishee without proof of the amount owing by the garnishee to the judgment debtor; and for such a cause prohibition will lie.

There is nothing in the sub-section substituted by 49 V. c. 15, s. 12, for R. S. O. (1877) c. 47, s. 136, s.-s. 2, which repeals the condition precedent in s. 132 to the Judge's giving judgment against the garnishee.

Held, also, that, if necessary, the writ of prohibition should go to compel the repayment to the garnishee of money paid by him into the Division Court.

J. H. Ferguson, for the garnishee.

No one contra.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 1ST MARCH, 1888.

McLEAN v. BROWN.

Sale of goods—Contract—Material condition of shipment—Refusal to accept—Action for deposit and damages.

McL. purchased lambs from B. to be shipped to McL., B., & McL., which condition, McL. said, he inserted "to help our business * * and to help build the firm up," the firm being a new one. B. disregarded this condition and shipped them to another name, and McL. refused to accept. In an action for the deposit paid at the time of the contract and for damages,

Held, affirming ROSE, J., that the term of the bargain as to the manner of consignment was a material part of it, material to the plaintiff, as the defendant well knew, and following *Bowes* v. *Shand*, L. R. 2 App. Cas. 455, that the plaintiff must succeed.

Mornington v. *Wright*, 115 U. S. R. 188, referred to.

McCarthy, Q.C., for the appeal.

Aylesworth, contra.

[BOYD, C., 16TH DECEMBER, 1887.

In re CENTRAL BANK OF CANADA.

Company—Winding-up Act, R. S. C. c. 129—Shareholders' and creditors nominees for liquidators—Interested liquidators—Parties mostly concerned in realizing assets—Liquidators' compensation.

Under ss. 98 and 99 of the Winding-up Act, R. S. C. c. 129, meetings of shareholders and creditors respectively were held. The shareholders' meeting recommended the appointment of C., G., and S. as liquidators; the creditors' meeting recommended C., G., and H. On the application to the Court for the appointment of three liquidators it was not denied that it would be necessary to resort to the double liability of shareholders to satisfy the claims of creditors under R. S. C. c. 120, s. 70.

Held, that the choice of the creditors, they having the chief and immediate concern in realizing the assets, would be adopted by the Court, and their nominees, C., G., and H., should be appointed.

As between H. and S. preference should be given to the former, because he was neither a creditor nor a shareholder, while S. was both and so at a disadvantage; the general rule being that it is desirable that liquidators should be disinterested persons.

S. 28 of the Winding-up Act intends that the remuneration of liquidators is not necessarily to be increased because three are to be paid instead of one. The recompense for service is usually a percentage based on the time occupied, work done, and responsibility imposed, and when fixed goes to the liquidator, and if more than one, is distributed amongst them.

Bain, Q.C., for the petitioning creditor.

Robinson Q.C., and *S. H. Blake*, Q.C., for the Bank.

[14TH FEBRUARY, 1888.

REINHART v. SHUTT.

Mechanic's lien—Mortgagee—Prior or subsequent incumbrancer.

The plaintiff worked on a barn of defendant up to 9th August, 1887, and did some further work on 25th October, following. The defendant mortgaged his land to A. S. by mortgage dated 21st October, and registered 24th October. The plaintiff registered a mechanic's lien on 25th October, and having brought his action against the defendant only, obtained the usual judgment with a reference. The Master made A. S. a party to the suit in his office, and A. S. petitioned to have the Master's order set aside.

Held, following *McVean* v. *Tiffin*, 13 A. R. 1, that the mortgage was not a subsequent but a prior mortgage as regarded the plaintiff's lien, and that the Master should not have added A. S. as a party.

G. W. Field and *W. M. Douglas*, for the petitioner.

Shepley and *E. O'Connor*, for the plaintiff.

WEST v. TOWN OF PARKDALE.

Damages—Measure of—Evidence—Injury to land—Injury to business—Prospective value of land.

The defendants having built a subway in front of the plaintiffs' property, and in so doing lowered the highway so as to cut off the access thereto which was previously enjoyed, and seriously injure the same under the circumstances set out in 7 O. R. 270; 8 O. R. 59; 12 A. R. 393; 12 S. C. R. 250; and 12 App. Cas. 602, it was referred to an official referee to take an account of the damage, if any, sustained by the plaintiffs by reason of the wrongful acts of the defendants and to fix the compensation proper to be paid in respect thereof. On such reference the referee ruled (1) that the measure of damages was the difference in value of the property before and after the construction, with interest added; (2) that the prospective capabilities or value of the land could not be taken into account, except so far as such elements enter into the computation of the then market value,

or have regard to what would have been the present value of the property had the subway not been constructed; and (3) that the plaintiffs were not entitled to special damages for injury to their business. On an appeal from this ruling,

Held, that the corporation were liable as wrongdoers who were not protected from the consequences of their tort by any statutory provision, and they should make good all damages sustained for which an action would lie for their unauthorized act, such damages being of a twofold character, involving injury to the plaintiffs' lands and to his business. If in the evidence one injury could be discriminated from the other it was competent to recover under both heads.

Held, also, that evidence might be received of the present value of the property with a view to throw light on the prospective capabilities of the land at the date of the trespass, but not to form a basis for compensation on its present value. The evidence must be used to aid in fixing compensation for the detriment sustained at the date of the perpetration of the wrong, having regard to the then present and the potential value of the property.

W. Cassels, Q.C., and *H. Cassels*, for the plaintiffs.

Osler, Q.C., and *J. H. Macdonald*, Q.C., for the defendants.

[1ST MARCH, 1888.

In re UNION RANCHING COMPANY.

Upon the presentation of a petition by certain shareholders of the above company praying a winding-up order under R. S. C. c. 129;

Held, that R. S. C. c. 129, like the Insolvent Act of 1875, which provided for the winding-up of incorporated companies, is intended to be put into operation at the instance of creditors only.

Snelling, for the petitioners.

Bain, Q.C., and *MacGregor*, for the company.

[FERGUSON, J., 13TH MARCH, 1888

KINCAID v. KINCAID.

Receiver by way of equitable execution—Motion for in Court or Chambers—Costs—O. J. Act, s. 17, s-s. 8, Rule 399—Amount of judgment—Other remedies.

A motion for the appointment of a receiver by way of equitable execution is properly made in Court, notwithstanding the language of the O. J. Act, s. 17, s-s. 8, and Rule 399, and the applicant will not be restricted to the costs of a Chambers motion.

A judgment for $212.60 is not too small to justify the judgment creditor in moving for a receiver.

It is no answer to such a motion that the judgment creditor could make the amount of his judgment out of the defendants by the sale under common law process of other property of the defendant than that sought to be reached by the appointment of a receiver.

E. H. Britton, for the plaintiff.

A. H. Marsh, for the defendant.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1888.

WELLBANKS v. CONGER.

Costs—Certificate for—Action for libel—Nominal damages—Cause for depriving successful party of costs.

Where in an action of libel the plaintiff obtained a verdict for twenty cents damages:

Held, that no certificate or order for full costs was necessary, and that the plaintiff could be deprived of such costs for good cause only.

Wilson v. *Roberts*, 11 P. R. 412, followed.

The Court cannot look behind or beyond the finding of the jury as to the right of a party to recover a verdict; and there-

fore the cause here alleged for depriving the plaintiff of costs, viz., that he was really not entitled to recover, as shewn by the result of a trial of substantially the same issues before another forum, was not to be regarded.

Ritchie, Q.C., for the plaintiff.

W. H. P. Clement, for the defendant.

In re McLEOD v. EMIGH.

Prohibition—Division Court—Married woman—Examination and committal as judgment debtor—Indorsement on judgment summons.

A judgment against a married woman, by virtue of the Married Women's Property Act, creates no general personal liability, but merely charges her separate estate; and the provisions of s. 177 of the Division Courts Act, R. S. O. (1877) c. 47, as amended by 43 V. c. 8, touching the examination of judgment debtors, are not applicable to a married woman against whom judgment has been obtained in the Division Court; and, even if liable to be examined, such a person is not liable to be committed to jail under s. 182. *Metropolitan L. & S. Co.* v. *Mara*, 8 P. R. 355, distinguished.

A creditor's rights against a married woman debtor are determined by the statute at the time the debt is contracted, and cannot be enlarged by the debtor subsequently becoming a widow.

Held, also, following *Reg.* v. *The Judge of the Brompton County Court*, 18 Q. B. D. 213, that the Judge's endorsement on the judgment summons was the order upon such summons and that a subsequent order was illegal.

Prohibition was ordered to restrain the enforcement of a warrant for the committal of the defendant, a married woman.

A. M. Grier, for the plaintiff.

Aylesworth, for the defendant.

FERGUSON v. KENNEY.

Parties—Attacking fraudulent conveyance—Assignee for creditors under 46 V. c. 26, (O.)—Execution creditors.

In an action to set aside a conveyance by K. to his wife as fraudulent, brought by the assignee for the benefit of creditors

of K., in pursuance of the exclusive powers conferred upon such assignees by 48 V. c. 26, s. 7 (O.), an order was made adding certain execution creditors of K. as parties plaintiff, upon the motion of the plaintiff, who desired that the action should not be defeated if in other litigation pending it should be determined that the Act was *ultra vires*.

A. C. Galt, for the plaintiff.

George Kerr, for the defendant.

[ROSE, J., 20TH MARCH, 1888.

ROBERTSON v. HETHERINGTON.

Mortgagor and mortgagee—Acceleration clause in mortgage—Staying sale under power on payment of arrears—Laches.

Motion by the plaintiff, a mortgagor, to continue an *interim* injunction restraining the defendant, the mortgagee, from selling the mortgaged premises under the power of sale in his mortgage.

The action was for the injunction only; the plaintiff not seeking to redeem. It appeared that the mortgage moneys were due by reason of an acceleration clause, the interest being two years in arrear. The plaintiff had made a tender before bringing the action, but it was refused as insufficient. The *ex parte* injunction order was granted upon the plaintiff bringing into Court the amount of arrears, and the motion was now made to continue it.

Allan McNab, for the motion, referred to *Tylee* v. *Hinton*, 42 U. C. R. 228; 3 A. R. 53; and to G. O. Chy. 461.

Middleton, contra.

ROSE, J.—I hold that General Order 461 does not apply to proceedings under the power of sale, no suit having been instituted by the mortgagee, and therefore this case does not come within *Tylee* v. *Hinton*, in which a suit had been instituted. I feel the force of the observations of Moss, C.J.A., in 3 A. R. at p. 60, to such an extent that I shall confine the case within the very letter of the decision in 42 U. C. R.

I am further of the opinion that owing to the delay here shewn by the mortgagor, no ground for any equitable interference is made to appear.

The motion must be dismissed with costs.

[MacMahon, J., 12th March, 1888.

RUSSELL v. MacDONALD.

Discovery—Examination of witness on pending motion—Production of books.

Upon a pending motion to restrain the defendant from receiving any moneys due under a certain contract and to appoint the plaintiff receiver of such moneys, an affidavit of the defendant's partner was filed in answer, and he was cross-examined upon it by the plaintiff; he was unable to answer a number of questions with reference to the defendant's position in regard to the partnership, because he had not with him the books of the partnership, from which alone the facts could be ascertained, and he refused to produce such books.

Held, that he should be ordered to attend for further examination and to produce the books required, at his own expense.

In re Emma Silver Mining Co., L. R. 10 Ch. 194, followed.

H. W. Mickle, for the plaintiff.

Bain, Q.C., for the defendant.

IN CHAMBERS.

[Galt, C.J., 23rd March, 1888.

REGINA v. GREEN.

Criminal law—Summary conviction—Sentence of imprisonment pronounced in absence of prisoner—Discharge.

Motion on the return of a *habeas corpus* to discharge the defendant from custody.

The defendant was summarily tried by the Police Magistrate for the county of Brant upon an information for selling intoxicating liquor to an Indian, contrary to the Indian Act. The magistrate heard the evidence and at the conclusion in

presence of the defendant reserved judgment, appointing a day and place for giving it. Upon the day and at the place so appointed the magistrate gave judgment against the defendant and then proceeded to sentence him in his absence to four months' imprisonment, without the option of a fine.

MacKenzie, Q.C., for the defendant, contended that the sentence, being for corporal punishment, was improperly pronounced in the absence of the defendant, citing *Duke's Case*, 1 Salk. 400.

Delamere, for the Magistrate, and *Aylesworth*, for the prosecutor, contra, referred to R. S. C. c. 178, s. 39, and to *Regina* v. *Smith*, 46 U. C. R. at p. 445.

GALT, C.J., made the order for the prisoner's discharge.

[27TH MARCH, 1888.

DENNIS v. CURREY.

Venue—Place where cause of action arose.

The plaintiffs appealed from an order of the Master in Chambers changing the place of trial from Toronto to Woodstock. The action was upon a promissory note made at the defendant's residence in Woodstock, payable there. The note was transferred to the plaintiffs, who lived in Toronto. The defence set up that the note was given without consideration, of which the plaintiffs had notice, and was negotiated contrary to an agreement between the original parties to it. The plaintiffs said they had about a dozen witnesses in Toronto, and the defendant that he had about the same number in Woodstock.

J. R. Roaf, for the appeal.

Douglas Armour, contra.

GALT, C.J., affirmed the Master's order, saying that the defendant should not be taken away from his own abode, where the cause of action arose, to defend the action.

[FERGUSON, J., 20TH MARCH, 1888.

PEARSON v. ESSERY.

Contempt of Court—Attachment—Judgment debtor—Married woman—Judgment for costs.

Held, that the defendant was liable to committal for contempt in not attending to be examined as a judgment debtor, although she was a married woman and the judgment was one for costs. Her imprisonment under such committal would not be an imprisonment for non-payment of costs.

F. E. Hodgins, for the plaintiff.

No one for the defendant.

[ROSE, J., 22ND MARCH, 1888.

McKAY v. ATHERTON.

Judgment debtor—Committal for unsatisfactory answers.

The defendant, a widow, upon her examination as a judgment debtor, admitted having lent her brother $300, and having in her house at the time of the examination $100, which she refused to hand over to apply on the judgment, because she had no other property with which to support herself and three children.

The Judge to whom an application to commit the defendant for unsatisfactory answers was made,

Held, that the facts of the case did not bring it within the decisions in *Metropolitan L. & S. Co* v. *Mara*, 8 P. R. 355, and *Crooks* v. *Stroud*, 10 P. R. 131, and, without laying down any rule, declined, in the exercise of his discretion, to order a committal without further information than was afforded by the examination.

J. B. Clarke, for the plaintiff.

No one for the defendant.

[ROBERTSON, J., 26TH MARCH, 1888.

In re CANADIAN PACIFIC R. W. CO. AND GRAND TRUNK R. W. CO.

Railway—Crossing—Arbitration—Right to apply under C. S. C. c. 109, s. 6, s-s. 13.

An application by the Grand Trunk R. W. Co. and the Midland R. W. Co. of Canada to a judge for the appointment by him of arbitrators to determine the point and manner, if any, of the crossing or intersection or connection within the City of Toronto, at a point east of Yonge Street, by the lines of Railway of the Ontario and Quebec R. W. Co. and the Canadian Pacific R. W. Co., of or with the lines of railway of the Grand Trunk R. W. Co. and the Midland R. W. Co. of Canada, and the amount of compensation to be paid therefor, pursuant to the Railway Act, R. S. C. c. 109, s. 6, s-s. 13.

It appeared by the material filed that the Railway Committee of the Privy Council of Canada had settled that there should be a level crossing at some point between Berkeley and Parliament Streets, Toronto.

W. Cassels, Q.C., and *H. Cassels*, for the applicants.

Moss, Q.C., and *R. M. Wells*, for the Canadian Pacific and Ontario and Quebec Railway Companies, contra. Arbitrators cannot be appointed on the application of the Grand Trunk Co.; the point or manner of crossing is under the section of the statute to be agreed upon, and if not it is to be settled by arbitration; it is for the C. P. R. Co. to apply when they determine upon their course.

ROBERTSON, J.—I think the application must be refused. I think the applicants have no right to come here and ask for this appointment; before the Canadian Pacific Co. can avail themselves of the right to cross under s-s. 13, they must come to an agreement with the other company or else have the matter settled by arbitration; if they desire to cross it will be for them to apply. There will be no costs of this application to either party.

[MACMAHON, J., 12TH MARCH, 1888.

GUESS v. PERRY.

Writ of summons—Amending indorsement—Re-serving the writ.

The writ of summons was specially indorsed with a money demand, besides which the indorsement claimed damages for waste, etc. The plaintiff obtained an *ex parte* order amending the indorsement by striking out the claim for damages.

Held, that judgment by default could not be entered after the amendment without re-serving the writ on the defendant.

James Smith, for the plaintiff.
C. R. W. Biggar, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

Ex parte HUMBLE.

Penalty—Destruction of woods, etc., by fire—48 V. c. 11—Action of debt.

The penalty imposed by the Act 48 V. c. 11, s. 13, for negligently allowing a fire to spread and destroy property contrary to the provisions of s. 5 of the Act, is recoverable by action of debt under s. 15; and not by summary conviction.

HICKMAN v. TRITES.

Costs—Certificate for—49 V. c. 18—Application of to suits pending.

The Act 49 V. c. 18, allowing a judge to certify for costs where the amount recovered by the plaintiff is within the jurisdiction of the County Court, applies to actions pending at the time the Act passed; WETMORE, J., dissenting.

GILBERT v. DOANE.

Equity appeal—Grounds—Statement of.

On an appeal from a decree in equity, stating as grounds of appeal: 1. That the judge was wrong in rejecting the evidence of the defendant. 2. That the decision was against law and equity in holding that the plaintiff was entitled to recover. 3. That the judge was wrong in rejecting all oral evidence and deciding on documentary evidence alone. 4. That the judge should have dismissed the plaintiff's bill upon the evidence adduced, and declared that the plaintiff was not entitled to any relief in equity. 5. That the decree was in other respects inequitable and erroneous:

Held, by a majority of the Court, that the third and fourth grounds were stated with sufficient particularity under the Consol. Statutes c. 49, s. 61.

GOODACRE v. RANNEY.

Equity appeal—Consol. Statutes c. 49, s. 63—Judge's order for printing the proceedings—Rule of Easter Term, 46 V.—Statement of grounds of appeal—Ex parte injunction—Dissolving on same facts on which granted.

If the appellant in an equity suit prints all the pleadings, etc., in the cause, it is sufficient; and a Judge's order under the rule of Easter Term, 46 V., directing which part of the pleadings, etc., shall be printed, is not necessary: *per* WELDON, WETMORE, and FRASER, JJ. (ALLEN, C.J., dissenting).

Under the Consol. Statutes c. 49, s. 61, the appellant in an equity suit may enter the cause on the appeal paper, though there has not been any Judge's order to set it down for hearing.

A notice of appeal stating that "upon the whole case presented by the bill, the Judge was wrong in dissolving the injunction," is sufficiently specific, following *Doane* v. *Gilbert*, *supra*.

An *ex parte* injunction order granted by a Judge cannot be dissolved by the Judge in Equity upon the same facts only on which the order was made. Such an application is in the nature of an appeal.

BURNS v. CASSELLS.

Maritime law—Charter-party—Perils of the sea—Damage to ship—Deviation for repairs—Necessity for going to nearest port—Onus of proof.

The defendant's ship was chartered by the plaintiff to sail from Liverpool to Bathurst in this Province, there to load a cargo of deals and proceed to Liverpool—the usual perils of the seas excepted. The ship sailed from Liverpool for Bathurst, and being damaged by storms became leaky, and when off the coast of Cape Breton, and within a few hours' sail of the port of Sydney, the master on the 27th of October having determined that he could not continue the voyage to Bathurst without repairs, which could not have been made there, altered his course and sailed for St. John in this Province, distant upwards of 400 miles from Sydney and out of the course of the voyage to Bathurst; and, in consequence of the time occupied in making repairs at St. John, the voyage to Bathurst was lost. The ship could have been repaired at Sydney, or at other neighboring ports in Nova Scotia. The navigation at Bathurst ordinarily closed about the 25th November. In an action for breach of the charter-party, the jury found, in answer to questions left to them, that the repairs could have been made at Sydney in time for the ship to complete her voyage to Bathurst, load her cargo, and sail before the navigation closed; and, under the Judge's direction on such finding, gave a verdict for the plaintiff.

Held, PALMER, J., dissenting, that the direction to the jury was substantially correct; that it was the duty of the master to go to the nearest available port for repairs; that his not doing so and going to St. John was a deviation; and that the onus was on the defendant to show that the necessary repairs could not have been made at Sydney to enable the ship to complete her voyage to Bathurst and load before the close of the navigation.

Per PALMER, J., that there was no reasonable evidence to leave to the jury that the repairs could have been made at Sydney in time for the ship to proceed to Bathurst and load before the navigation closed; and that the question for the jury should have been, whether the master in not going to Sydney for repairs, and then attempting to proceed to Bathurst, acted in a reasonable manner under the circumstances; and whether, if he had acted as a reasonable and skilful master should act, he could have arrived at Bathurst in time to load his cargo and leave that autumn.

MANITOBA.

In the Queen's Bench.

[IN APPEAL.

HOOPER v. COOMBS.

Illegal contract—Sale of whiskey to be taken to N. W. T.

The plaintiff agreed to put on board the cars at B. a certain quantity of whiskey and potatoes; he knew that it was the defendant's intention to ship them through the North-West Territories without obtaining a permit, and that to do so was illegal; and he assisted in the transaction by concealing the whiskey among the potatoes. The defendant agreed to pay the price of the articles when placed on the cars.

In an action for the price of the goods,

Held, 1. That even if the plaintiff had agreed to ship the goods, their acceptance by the railway company was a performance of the contract, although the railway might have subsequently refused to give a shipping bill.

2. A contract lawful in itself is illegal, if it be entered into with the object that the law should be violated.

3. As a matter of public policy Courts should refuse to enforce contracts projected in violation or intended violation of Dominion legislation, although that legislation may not apply to the Province in which the contract is made or is sought to be enforced.

Hooper v. *Coombs*, 4 Man. L. R. 35, not followed.

4. The fact that the illegal purpose was not carried out was immaterial.

5. The contract for the potatoes and whiskey being an entire contract, the plaintiff could not recover for the potatoes, the defendant not having accepted or received them.

McEDWARDS v. OGILVIE MILLING COMPANY.

Master and servant—Dismissal for disobedience—Construction of order—Non-suit—Scintilla of evidence.

The defendants wrote to their servant, the plaintiff, on 28th November: "You must have your weekly warehouse reports made out on time for the Tuesday morning's mail. No excuse will be accepted for non-fulfilment of this rule." During the following month the reports were not sent regularly, and on the 30th December, instead of sending the report due on that day, the plaintiff wrote saying he would send it by next mail. He was thereupon dismissed. The excuse for non-compliance was that he was too busy; but he was unable satisfactorily to show in what way his time had been employed, and it appeared he was authorized to employ all the assistance he required.

At the trial the Judge told the jury that it was for them to say whether the order was intended to be peremptory, and the jury found a verdict for the plaintiff for $90.

Held, that the charge was erroneous; that it was not for the jury to construe the language of the order and to find whether it meant exactly what it literally said; that the order was positive and clear; that no sufficient excuse for non-compliance had been given; and although there might have been some evidence to go to the jury, yet that there was none upon which a verdict could be supported; and a non-suit was entered.

McROBBIE v. TORRANCE.

Promissory note or agreement—Impossibility of presentment.

If the place at which money is payable under a simple contract ceases to exist, it is not necessary that any demand for payment be made to enable the creditor to maintain an action.

Per TAYLOR, C.J.—If the place at which a promissory note is payable ceases to exist, personal presentment must be made.

A promissory note was preceded by the words, "To collaterally secure the payment of the money mentioned in an assignment of mortgage," etc.

Held, that the instrument was an agreement merely, and not a promissory note.

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[FULL COURT.

WADDELL v. THE DOMINION CITY BRICK COMPANY.

Company—Agreement prior to charter—Ratification.

Prior to the granting of the defendants' charter, S., who afterwards became its manager, made a verbal agreement with the plaintiff with reference to land of the plaintiff. Subsequently and after the charter a written agreement was prepared. The parties to it were the plaintiff of the one part, and B. and D. (who were shareholders in the company), of the other part. It was signed "Dominion City Brick Company, Aubrey Smith, manager;" but the company's name appeared in no other part of the document.

Held, 1. That the company was not bound by the verbal agreement, because made previous to its charter, and therefore incapable of ratification.

2. That the company was no party to, and was not liable under the written agreement.

[TAYLOR, C.J.

CANADIAN BANK OF COMMERCE v. NORTHWOOD.

Counter-claim—Cause of, arising out of jurisdiction.

A defendant can set up by way of counter-claim only such demands as he could base an action upon: consequently a cause of action arising out of the jurisdiction cannot be set up by way of counter-claim.

REGINA v. GRANNIS.

Intoxicating liquors—Liquor License Act—Conviction—Evidence—Production of license—Fine—Distress—Joint conviction against partners.

Upon a charge of selling liquor without a license there must be evidence that the liquor was intoxicating.

Where the charge is made against a licensee for some breach of the statute, it must be shown that he was a licensee, and the production of the license after sentence for the purpose of being indorsed as required by the statute, is not sufficient.

The fine imposed by a conviction included a share of the expenses of bringing a witness for the prosecution from a distance.

Held, that such inclusion vitiated the conviction.

A conviction under the Act is not bad because it does not direct distress previous to imprisonment.

Evidence that a certain act was done at or in Portage la Prairie will not be taken to apply to the town rather than to the municipality or county of that name.

A conviction will not be quashed upon the weight of evidence merely.

Semble, that a joint conviction against two members of a firm for a breach of the statute is bad.

GALT v. KELLY.

Real Property Act—Removal from files of document improperly placed in Registrar's office.

A document drawn up as for registration under the Mechanic's Lien Act, was filed in the Registrar General's office. Upon an application to remove it from the files;

Held, that the Court had no power to order its removal; but as it was improperly placed there, the application was refused without costs.

[DUBUC, J.

SHAW v. CANADIAN PACIFIC R. W. CO.

Pleading—Declaration—Contract or tort.

In a declaration against a railway company, an agreement was alleged to safely and securely carry the plaintiff from one point to another; with a breach that the defendants did not safely and securely carry the plaintiff, but on the contrary, through their negligence and omission the plaintiff was injured.

Held, that the count was tort and not contract.

[KILLAM, J.

PATTERSON, *In re.*

Power of appointment—General or limited—Execution against donee of power.

R. G. being the owner of certain lands, and M. G., his wife, being the owner of certain other lands, they joined in a conveyance of them to a trustee. The conveyance (22nd July, 1884) recited that it had been agreed to settle their lands "for the benefit of themselves and their children" as hereinafter appeared. The trusts declared were to hold to such uses as R. G. and M. G. or the survivor of them should by deed or will appoint, and secondly, until and in default

of appointment to the use of M. G. for life, and after her decease to the use of R. G. for life, and after decease of both to the use of their children in equal shares in fee.

By a subsequent conveyance (18th November, 1885) R. G. and M. G. appointed and conveyed the lands to R. G. upon the following trusts: to the use of the children, with power to R. G. to appoint among them; in default of appointment, and after the death of R. G., to M. G. for life, with power to her to appoint among the children; and in default of such appointment to the children then living.

By deed (8th February, 1888) R. G. and M. G. appointed and conveyed to P., one of the children.

Held, 1. That the power of appointment in the first deed was general and not limited as to its objects to the children.

2. That the second deed, therefore, was a good appointment, and vested the legal estate in R. G., and the equitable in the children, with power to transfer this latter estate to one or more of the children.

3. That executions against R. G. between the first and second deeds did not affect the title of P., the grantee under the third deed.

FREEHOLD LOAN CO. v. McARTHUR.

Solicitor — Negligence — Duty of solicitor on purchase of mortgage — Acknowledgment by mortgagor—Production of title deeds.

S. claimed to be mortgagee of certain lands, and agreed to sell the mortgage to the plaintiffs. The plaintiffs employed the defendant to examine the title of S. and prepare the necessary assignment. The defendant passed the title and took an assignment of the mortgage, and upon his report the plaintiffs made the purchase. It afterwards transpired that the mortgage was a forgery.

In an action for negligence it appeared that the defendant had not before passing the title obtained an acknowledgment from the mortgagor of the amount due upon the mortgage;

and had not required the production of the title deeds of the property. The mortgage was dated but a short time before the assignment and was not due.

Held, 1. That acceptance of the title without the mortgagor's certificate did not constitute such negligence as to render the defendant liable.

2. That notwithstanding the Registry Act, it is as much as ever the duty of a solicitor to inquire for the title deeds, and to insist upon their production, unless their non-production is satisfactorily accounted for, and that upon this ground the defendant was liable for the amount paid by the plaintiffs and interest.

[BAIN, J.

BURT v. CLARKE.

Registered judgment—County Court — Exemptions — Residence commenced after judgment registered—Dissolution of partnership — Registration—Continuance of liability—Costs.

A County Court judgment for less than $180 registered before the County Court Act of 1887, and re-registered under s. 135 of that Act, before the 1st of November, 1887, is valid, and may be enforced by bill in equity.

After a judgment was registered, the judgment debtor took up his residence in a house which he owned and claimed its exemption.

Held, that it was not exempt.

A partnership was dissolved, but the dissolution was not registered. One of the partners continued the business under the partnership name and committed a tort.

Held, that the retiring partner was not liable, there being no evidence that he consented to or knew of the continuance of the firm name.

The plaintiff's claim being small, his costs were fixed at $50.

ONTARIO.

In the Maritime Court.

THE "F. J. KING."

[SENKLER, SUR. J., 16TH MARCH, 1887.

Collision—Pleading—Mere denial by answer—Counter-claim.

In a cause of damage arising from a collision between two schooners, it appeared that the *Caroline Marsh* was entering the harbor of Port Dalhousie, and when between the piers collided with the *F. J. King* in tow. Both vessels suffered damage. The petition set out specifically a version of the facts which it was alleged occasioned the collision. The answer denied the allegations in the petition, denied that the collision occurred through the unskilful or careless management of the defendants' schooner, and alleged that due and proper care and precaution were observed by those in charge of her, and that the collision occurred through the careless, improper, and unskilful management of the petitioners' schooner.

Held, that the answer was insufficient, that it should have set out the defendants' version of the facts and circumstances attending the collision.

Held, also, that no counter-claim can be pleaded in this Court in a cause of damage.

R. Gregory Cox, for the petitioners.

Ingersoll, for the defendants.

[16TH APRIL, 1887.

THE SIR S. L. TILLEY.

Towage—Damage—Jurisdiction—Demurrer ore tenus—Costs.

Held, that this Court cannot entertain a cause of damage to a tow, arising from the negligence of the towing vessel, where no collision between vessels occurs.

Instead of filing a demurrer, the defendant raised the objection to jurisdiction by his answer.

Held, that a demurrer should have been filed, and the Court in giving effect to the objection made no order as to costs.

The petition in this case was filed on behalf of the owners of the schooner *Edward Blake* against the propeller *Sir S. L. Tilley*, and its owner intervening.

The petition alleged that the *Blake* being in tow of the *Tilley*, the vessels proceeded on a voyage from Port Colborne to a point on Lake Superior, but when they reached the mouth of the Detroit river, the propellor was so mismanaged and taken so far out of her proper course that the *Blake* was towed against and came into collision with the stone and iron work forming the foundation or structure of the Bar Point light, and seriously injured. The petitioners claimed $2,200 damages and costs.

An answer was filed on behalf of Sylvester Neelon, the owner of the propellor, which, after setting up a defence on the merits, contained the following submission: "The defendant further submits that this Court has no jurisdiction to entertain this cause, and claims the same benefit from this objection as if he had demurred to the said petition."

Osler, Q.C., and *C. H. Connor*, for the petitioners.

W. Cassels, Q.C., and *R. Gregory Cox*, for S. Neelon, the defendant.

Counsel for the defendant submitted that the Court had no jurisdiction, the Vice-Admiralty Court having no jurisdiction apart from statute where no collision occurs between two vessels: *The Robert Pow*, Br. & L. 101; *The Night Watch*, Lush. 232; *The Julia*, Lush. 224; *The Energy*, L. R. 3 Ad. & Ec. 48. The Vice-Admiralty Courts Acts do not contain the provision of the Admiralty Courts Act which confers jurisdiction over "any claim for damage *received* by any ship;" 3 & 4 V. c. 65, s. 6 (Imp.); 24 V. c. 10, s. 7 (Imp.) Damage done by a ship means damage done by those in charge of a ship, with the ship as the noxious instrument: *The Vera Cruz*, L. R. 9 P. D., at pp. 88, 101.

Counsel for the petitioners contended that the statutory jurisdiction was wide enough to embrace a claim such as that sued for.

SENKLER, SUR. J.:—The case of the *Robert Pow*, Br. & L. 99, decided that the Court of Admiralty in England had not jurisdiction under 3 & 4 V. c. 65, s. 6, or 24 V. c. 10, s. 7, to entertain a claim against a steam-tug for damage occasioned to the vessel towed by negligence in towing, the damage arises not by collision but by the vessel taking the ground.

The first Act covers the case of "Damage *received* by any ship," and the second, "Any claim for damage *done* by any ship."

I am unable to distinguish that case from the present one, and unless it has been overruled, it must govern it.

Mr. Marsden, in the 2nd edition of his work on "Collisions at Sea," at page 101, states that where by the negligent navigation of one ship, a collision occurs between two others, or another ship is damaged either by collision or in any other way, the first ship is liable both at law, and it seems also in admiralty, and not the less so because she escapes collision herself; and in a note to this passage, after citing several cases, he says *The Robert Pow*, so far as it decided the contrary, would not now be followed.

I have examined such of the cases he refers to as I have access to, and do not find that they overrule *The Robert Pow*. In one of them *The Energy*, L. R. 3 Ad. & Ec. 48, *The Robert Pow* is referred to without disapproval as laying down the limits within which the jurisdiction must be exercised.

I do not feel warranted by this remark of Mr. Marsden's in disregarding a solemn decision of the Admiralty Court, and feel bound to give effect to the objection to the jurisdiction of the Court taken by the counsel for the defendant.

I feel at the same time that I ought to express my disapproval of the manner in which the objection has been taken, and my surprise that it was not taken by demurrer. Had it been so taken, the question could have been fully argued and maturely considered, and an appeal had from my decision, if desired. As it is, I am compelled to give a hurried decision on a most important point, which can hardly be satisfactory even to my own mind, and all the costs of an actual trial are incurred without any profit to either side.

In no event would I give more than the costs of a demurrer, and considering the useless expense the petitioners have been put to, I am of opinion I should order no costs to be paid.

The result is that I decline to hear the petition for want of jurisdiction, and make no order as to costs.

[18TH MAY, 1887.

THE "F. J. KING."

Collision—Regulations for preventing collisions at sea—Look-out—Lights—Tug and tow one vessel.

Held, that the regulations for preventing collisions, R. S. C. c. 7, s. 2, apply to the harbour of Port Dalhousie.

In a case of collision between a schooner entering the harbour of Port Dalhousie and a schooner being towed out of the harbour, which occurred between the piers,

Held, that the schooner entering the harbour was in fault in not having a look-out, the captain not being sufficient while in command beside the helmsman, and performing also the duties of a look-out; and that she was also in fault in not keeping to the starboard side of the channel.

Held, also, that though Art. 21 is not expressly applicable to sailing vessels, they should keep to the starboard side of narrow channels when it is safe and practicable to do so.

Held, also, that the tug was at fault for proceeding at full speed at night in such a place, in not carrying proper lights, and in not keeping out of the way of the schooner, as it was her duty to do, though towing a schooner.

Held, also, that the tow was in fault in not following the tug immediately when she went to starboard to avoid a collision.

Held, also, that a tug and tow are one vessel, and that a steam ship.

Both vessels being in fault, judgment was for dismissing the petition without costs on a release of all claims against the plaintiff, there being no cross-petition, otherwise judgment for the plaintiff.

This action was brought by the owner of the schooner *Caroline Marsh* to recover damages for injuries caused to his vessel by collision with the schooner *F. J. King* on the night of the 25th May, 1886, in the channel between the piers forming the entrance to Port Dalhousie harbour. The *Marsh* was on a voyage from Oswego to St. Catharines with a cargo of coal, and the facts connected with the collision as stated by her captain at the trial were as follows:

The *Marsh* approached the entrance of the harbour on the 25th May last about 9 p.m. under full sail, and when about one and one-half miles out took off all her canvas except the main and foresail and jibs, and when from half to three-quarters of a mile outside straightened for the piers. Just before reaching the end of the pier the mainsail was taken in. It was then about 10 p.m., a clear, dark night, the wind about W.N.-W. The piers lie almost north and south. The captain was himself in charge of the vessel and looking out. The whole of the crew, consisting of a mate and

four seamen, were on deck. The vessel passed the end of the east pier, which projects the farthest, about straight with the course of the piers, and in the midchannel or a little west of it, going at the rate of three to four miles an hour. As they passed the small light-house at the end of the east pier some of the men were finishing getting in the mainsail, and the captain had sent the mate forward to take in the flying jib, when the captain says he saw a vessel approaching on his weather bow (the starboard). He was on the weather side of his vessel and could not see both sides of her. The other vessel was coming end on, but he did not see her lights. He told his helmsman to put his wheel to port, and ran to the leeward side of his vessel and saw a tug approaching on his port side one hundred to one hundred and fifty yards off. She was off his port bow. He says she had red and green lights; he saw no other. He sung out to the helmsman, "Hard-a-port," and about that time the tug blew one whistle, the first signal he heard. He called to the mate to let go the flying jib, and the mate called to the men to assist him. Before they got there the captain saw the vessel was getting close and that a collision was inevitable, and called the men aft fearing danger from falling spars. The object of letting go the flying jib was to let the vessel come faster into the wind. The vessels then came together; the *King* struck the *Marsh* about the cathead and with the corresponding part of the *King*. Not more than two minutes elapsed from the time the captain first saw the *King* until the collision occurred. The effect of the collision was to injure the *Marsh* to the extent of about $160 and the *King* to about the same extent. The anchor of the *Marsh* was on the port rail, pulled in over the rail with only the stock projecting. The anchor of the *King* seems to have been in a similar position on her; the two anchors came against each other with great violence and the stock of the *Marsh's* anchor was broken, and the anchor itself and some four or five fathoms of chain attached to it were thrown over into the water. Immediately after the collision the captain of the *Marsh* ordered the helmsman to put the helm hard to starboard. This and the anchor holding on to the bottom of the canal kept the vessel from swinging to the west pier. The flying jib and foresail were then taken in, and the stern of the vessel drifted against the east pier. The

anchor held the bow out. A tug then came out and towed the *Marsh* out to where the anchor was, and when it was hove up the flukes of the *King's* anchor were found attached to it.

The captain of the *Marsh* testified that the *King* was not following directly after the tug, which was twenty feet nearer the east pier than the *King* was. The tug passed between the *Marsh* and the pier and did not touch the *Marsh*. Had the *King* followed the tug she would not have touched the *Marsh* either. He said that, judging from where the anchor was found, the *King* must have been one hundred feet from the east pier when she struck the *Marsh*. The statement of the captain was corroborated in the main by his crew. They all stated that the *Marsh* was near the midchannel of the canal when struck, and that prior to the collision she was sailing up the channel, about midchannel, in a straight course. The captain, who was also part owner of the *King*, was called for the defence, and said that on the night in question he was going down the canal and heading out to Lake Ontario in tow of the tug *Rooth*, that they were keeping about the centre of the channel inclining to the east pier; the tug blew her whistle indicating that something was coming, and the *King* kept away to the east pier and got within twenty-five feet of it. In two or three minutes another whistle was given; the *King* was then running parallel with the pier and about twenty-five feet from it. After this second whistle the captain of the *King* saw from his starboard bow the red light of the *Marsh*, and she was certainly not then in the centre of the channel. He told the mate to put the helm hard-a-port; the mate did so and the *King* then struck the *Marsh* and glanced off against the pier. The damage done to the *King* was said to have been $166.

At the time of the collision the tug was on the starboard bow of the *King*, close to the pier. The port side of the tug would be about in line with the starboard side of the *King*. He said that the collision took place about one hundred and fifty to two hundred feet south of the large light-house. Frank Carter, the captain of the tug *Rooth*, which was towing the *King*, was called for the defence. He said that he started from lock one of the canal or near it, about 9.30 p.m., and kept a little east of the centre of the channel. He saw the *Marsh* outside, and then drew to the centre of the channel,

and kept there until within about four lengths of the *Marsh*, when he sounded the whistle once and ported his helm. He had blown a warning signal about five minutes before this. On blowing the second whistle he turned into the pier and got close to it; the *King* followed him and got within twenty-five feet of it. He said that the *King* followed behind him, and when struck was within twenty or twenty-five feet of the pier. The *Caroline Marsh* was east of the centre of the channel. When she was at the first light-house she was if anything to the east of the centre of the channel, and as they approached each other the *Marsh* was a little on the tug's starboard bow. When he sounded the second whistle he could see both the lights of the *Marsh;* she was almost end on. He went to starboard and thought the *Marsh* kept on her course. He thought the *King* followed right after the tug in a line. Edward Griffin, the mate of the *King*, was look-out at the time. He corroborated the captain's statement of the course of the *King*, although he only noticed one signal given by the tug, which he supposes was the second. He thought at the time of the collision the *King* was within twenty feet of the pier and parallel to it. Cameron, the second mate, who was steering the *King*, and Rostford, a sailor, stated that at the time of the collision the stern of the *King* was five feet further out than the bow, which was from fifteen to twenty feet out.

R. Gregory Cox, for the petitioner.
Rykert, Q.C., for the defendants.

The following authorities, in addition to those mentioned in the judgment, were referred to:—Tug and tow are to be considered as one vessel, and that a steamship, with reference to the regulations for preventing collisions at sea:—*The Cleadon*, Lush. 160; 14 Moore P. C. 92; 1 Asp. 41; 4 L. T. N. S. 157; *The American and the Syria*, L. R. 4 Ad. & Ec. 226; 6 P. C. 127; *The Zephyr*, 2 Asp. N. S. 352: *New York, etc., Co.* v. *Philadelphia, etc., Co.*, 22 How. 461; *The Pennsylvania*, 3 Ben. 215; *The Warrior*, L. R. 3 Ad. & Ec. 553; *The Fingal*, 2 Asp. 291.

As to responsibility of tow for faults of its tug:—*The Kingston-by-Sea*, 3 W. Rob. 153; *The Ticonderoga*, Swa. 215.

Where a steamship and a sailing-ship are proceeding in such directions as to involve risk of collision, it is the duty of the steamship to keep out of the way, and of the sailing-ship to keep her course :—R. S. C. c. 79, s. 2 ; Arts. 17, 22 ; *The General Lee*, 3 Asp. 204 ; *The City of Antwerp*, L. R. 2 P. C. 25 ; *The Velasquez*, L. R. 1 P. C. 494 ; *The Beryl*, L. R. 9 P. D. 37.

As to narrow channels :—Art. 21 ; *The Rhondda*, 8 App. Cas. 549 ; *The Clydoch*, 5 Asp. 336.

SENKLER, SUR. J.—It is not easy to reconcile the evidence of the captain of the *King* with that of the captain of the tug ; the latter says that when he saw the *Marsh* he drew to the centre of the channel and kept there until within four lengths of the *Marsh*, and then whistled and ported his helm and went towards the east pier. He had five minutes before this blown a warning whistle. This must have been at the moment he saw the *Marsh* first, or very soon after he did so, and about the time he drew to the centre of the channel. The captain of the *King* says that when the first whistle sounded he ported his helm and went to within twenty-five feet of the east pier. As the tow line was only seventy-five feet long it is difficult to understand how the tug could be in the centre of the channel, which is two hundred feet wide, and at the same time the vessel towed to within twenty-five feet of the east pier. The captain of the *King* also says the *Marsh* was two hundred or three hundred feet from him when he heard the second whistle. The captain of the tug says he was about four lengths away when he blew the second whistle. This would make the *Marsh* a good deal more than two hundred or three hundred feet from the *King* at that time. From the evidence of the captain and crew of the *King* and of the captain of the tug it is clear that the *King* had her proper red and green lights, but the tug had only one bright light instead of a red and green light and two bright lights as she ought to have had, and the witnesses for the petitioners who said they saw red and green lights on the tug must have been mistaken. Upon the evidence Mr. Cox for the petitioner contended that the *King* and the tug *Rooth* towing her were to be considered as a steamship ; and as this steamship and the sailing-ship *Marsh* were proceeding in

such directions as to involve risk of collision, it was the duty of the *King* and her tug to keep out of the way of the *Marsh*, as directed by article 19 of the regulations for preventing collisions contained in chapter 79 of the Revised Statutes of Canada, that according to article 22 it was the duty of the *Marsh* to keep her course as she did; that if the collision was occasioned by the fault of the tug, the *King* was responsible for the same, referring to the *Ticonderoga*, Swa. 215, and other cases; that section 7 of the above Act shows that the regulations apply to foreign vessels when in Canadian waters; that the evidence of the captain of the tug shows that the *Marsh* was on his starboard bow when he went to the east pier and that consequently the *King* and her tug in going towards the east pier partly crossed the bow of the *Marsh*, which was wrong and dangerous; and that their correct course to keep out of the way of the *Marsh* would have been to turn towards the west pier, and that at all events even if the course taken by the tug was correct, the *King* did not follow her directly but kept too far from the east pier and that this caused the collision, as it is evident that if the *King* had been as close to the pier as the tug was, she would have been further off, instead of being at least fifteen feet further off from it as she was, the collision would not have occurred. I called Mr. Cox's attention to article 26, which directs that in narrow channels every steamship shall, when it is safe and practicable, keep to that side of the fairway or mid-channel which lies on the starboard side of such ship. He never contended that this article applied only to the case of two steamships meeting each other. For the appellant it was urged that the statutory rules cited by Mr. Cox apply to open waters only and not to harbors and canals, and that the evidence shows that the *Marsh* did not keep to the proper side of the channel, and that she did not keep a proper lookout prior to the collision, and this neglect led to the collision. I am of opinion that the authorities support the contention of Mr. Cox, that the *King* and her tug the *Marsh* are to be considered as one vessel, and that a tug (Marsden on Collision, 2nd ed. 189); but, as stated by Mr. Marsden on the same page, it is obvious that a tug towing a ship or tow has not the same facility of movement as when she was unencumbered. She is not in anything like the

same degree the mistress of her own movements; she cannot by stopping or working her engines at once stop or back the ship in tow. In taking measures to avoid a third vessel she has to consider her tow, and a step that would be right and take her clear, if she were unincumbered, may bring about a collision between her tow and the ship, which she herself has avoided. Although, therefore, it is the duty of a tug with a ship in tow to comply as far as is possible with the regulations for preventing collision, it is also the duty of a third ship to make allowance for the incumbered and comparatively disabled state of the tug, and to take additional care in approaching her. These remarks are substantially repeated in the review of article 17 on pages 378, 379 of Mr. Marsden's book. With respect to article 21 I am unable to concur with the argument that it applies solely to two steamships. It of course does apply to that case, but I think it further is intended to indicate the course which every steamship is to take under ordinary circumstances, where it is safe and practicable, and which other vessels of either kind are to assume it will take and act accordingly. It is not made compulsory on sailing-ships to keep to the starboard side, as frequently it may be impossible for them to do so, owing to the direction of the wind and the course of the stream, but I think they should do so whenever practicable.

Mr. Marsden, in his remarks on this article, says, when referring to the words "when it is safe and practicable," at page 406 of his book: "These words appear to qualify the general operation of the rule, but it is doubtful whether they have any further effect than the general saving clause of Art. 23. They would probably be held to apply to the case of a steamship on her right side of the channel falling in with a sailing vessel on her wrong side, so as to require the steamship to keep out of the way of the sailing-ship in compliance with Art. 17, *notwithstanding the fault of the latter in being on her wrong side.*"

It is also necessary in considering any case of collision to bear in mind the following articles, viz.: "Art. 22. When by the above rules one of two ships is to keep out of the way, the other shall keep her course." "Art 23. In obeying and construing these rules, due regard shall be had to all dangers of navigation and to any special circumstances

which may render a departure from the above rules necessary in order to avoid immediate danger." "Art 24. Nothing in these rules shall exonerate any ship or the master or crew thereof, from the consequence of any neglect to carry lights or signals, or of any neglect to keep a proper look-out, or of the neglect of any precautions required by the ordinary practice of seamen or by the special circumstances of the case."

Upon the evidence I think that the *Marsh* was properly handled when approaching the entrance of the piers in having her canvass reduced, and that she entered the space between the piers about mid-channel, and was headed up the centre of the channel. I think, however, as she was moving but slowly and with only her forward sail set, from the direction of the wind she drifted somewhat to the east, and was something to the east of the centre of the channel when her captain first saw the *King* approaching. She may have drifted, although her head was pointed a little towards the west. It very likely was headed so a little, as the captain of the tug says that the *Marsh* was a little on his starboard bow and seemed coming end on and he could see both her lights at the time he blew the second whistle. The captain of the *Marsh* had seen the *King* for the first time just before hearing the whistle, and had immediately told the helmsman to port the helm; he was on the weather or starboard side of his own vessel and saw the *King* on his weather bow. He could not see both sides of his own vessel ahead. The other vessel was coming end on; he went to leeward and saw the tug approaching on his port side. He then shouted out, "hard-a-port." In his cross-examination he says that he did this when he heard the whistle from the tug, from which it is plain that he had given the first direction to the helmsman to port before he heard any signal from the tug; he evidently did this because he recognized it was his duty to keep to the starboard of the vessel he was meeting. His second order was given when he had full view of the *King* and tug, and in obedience to the tug's signal to take the starboard side to avoid the collision. The first question that naturally occurs is, why did not those on board the *Marsh* become sooner aware of the approach of the tow? The answer suggested for the petitioner is that the number of lights that are always to be seen in the harbour and village of Port Dalhousie

make it very difficult for persons on a vessel entering the harbour from Lake Ontario to distinguish the lights of vessels coming out. There is doubtless a great deal of truth in this, but the fact that the difficulty existed instead of being an excuse, only shows the need for greater vigilance. Mr. Marsden, at page 435 of his book, says: "The look-out must be vigilant and sufficient according to the exigency of the case. The denser the fog and the worse the weather, the greater the need for vigilance. A ship cannot be heard to say that a look-out was of no use because the weather was so thick that another ship could not be seen until actually in collision." In *The Mellora*, 3 W. Rob. 7-13, Dr. Lushington said: "It is no excuse to urge that from the intensity of the darkness no vigilance however great could have enabled the *Mellora* to have descried the *George* in time to avoid a collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed. In ordinary cases one or more hands should be specially stationed on the look-out by day as well as by night; they should not be engaged upon any other duty, and they should be stationed in the bows or in that part of the ship from which other vessels can best be seen." Various instances are then given of cases in which particular vigilance has been held necessary.

The *Marsh* was entering a channel which was not only narrow and the entrance to a harbour, but the exit of a most important canal through which a large number of vessels are constantly passing during the season of navigation, and yet with a crew of a captain and mate and four men had no look-out, except the captain, who was at the same time engaged in control and management of the vessel. With the wind as it was, somewhat abaft the beam, and the sail she had on, it seems there was no difficulty in taking her to any part of the channel that was desired; yet it was not attempted to do more than to keep her at mid-channel. Had the *King* been seen sooner, as I think she would have been if a more vigilant look-out had been had, the *Marsh* could easily have been kept more to the starboard and all danger of a collision avoided, and this I think was her duty to do under Art. 21, if possible. The captain of the *Marsh* contended that it was not usual in vessels of the size of the *Marsh* to keep a man

specially looking out, and that it was customary for the captain to do this in addition to his other duty. I cannot recognize the validity of such a custom, especially when entering a canal like the Welland Canal. I must therefore find that the omission to keep a proper look-out on the *Marsh* contributed to the collision.

Then as to the conduct of the *King* and her tug: I have no doubt it was their duty under Art. 17 to keep out of the way of the *Marsh* as far as possible, and if the *King* or her tug had any doubt as to the course of the *Marsh* it was their duty to slacken speed under Art. 18, so as to avoid risk of collision. The captain of the tug admits that he was going at full speed, and this I think he had no right to do at night when approaching a sailing vessel, as he knew he was doing, in a narrow channel. There is some conflict of testimony as to the signals given by the tug; the captain of the tug says he gave two, one a warning whistle and then the whistle when he went towards the east pier, and the captain of the *King* corroborates him. The captain of the *Marsh*, however, says he did not hear the first whistle, and strange to say the look-out on the *King* did not hear it either, and none of the crew of the *Marsh* appear to have heard it. After the whistle was given to indicate that the tug was going to starboard there was no neglect of duty on the part of the *Marsh*. Her helm had been ported before this and was immediately put hard-a-port. The tug passed the *Marsh* in safety, but the *King* did not. This was either because the tug did not go to starboard soon enough, or because the *King* did not follow directly after her. I have some doubt whether the tug did turn into the east pier as soon as she should, but however that may have been, it is clear that the *King* did not follow her directly, but kept a good deal further out than was necessary, her starboard side being in a line with the port side of the tug and being from twenty to twenty-five feet from the pier. This was quite unnecessary, as vessels can go safely right up to the pier, and no doubt contributed to the accident.

It is also evident that the tug was in fault in not having her proper lights. The regulations apply to tugs and indeed direct special lights in their case. This however is not one of the grounds of complaint in the petition, and I do not rest

ıy judgment upon it. I therefore find both vessels to blame, ınd the loss must be divided. The only loss I have before ıe is that to the *Marsh*, which is shewn to be $157.35. The loss to the *King* is said to be $166, but as there is no ross-petition, that is not before me. As however the loss to ach vessel is so nearly the same, if a release of all claims in espect of the collision is executed by the owners of the *King* o the owners of the *Marsh* and filed with the Deputy-Regis- rar at St. Catharines within one month, to avoid further liti- ation I will dismiss the petition without costs, otherwise here will be judgment for the petitioners for $78.47 without osts, leaving the *King* to its cross-action.

[5TH MARCH, 1888.

THE "W. B. HALL."

aster's wages and disbursements—Damages for wrongful dismissal recover- able as wages—Jurisdiction of Court over claims under $200—Merchant Shipping Act 1854, 17 & 18 V. c. 104 (Imp.), ss. 188-191—Inland Waters' Seamen's Act, R. S. C. c. 75.

The defendant, a citizen of Toronto, owner of a steam barge, engaged ıe plaintiff as master for the season of 1887, reserving the right to pay m off at any time if he found the plaintiff's service not satisfactory to m. On the 22nd of November the defendant, being dissatisfied with e plaintiff, discharged him and forcibly removed him from the vessel. he plaintiff, who lived in St. Catharines, brought this suit there to cover $150, alleged balance of wages and disbursements due to him, aiming also damages for wrongful dismissal, and the vessel was rested at Toronto, where it was laid up for the winter.

Held, that the Court had jurisdiction, even though the claim should ove to be under £50 or $200; that the restriction of the jurisdiction in e case of master's wages to claims over £50 does not apply to masters vessels registered in Ontario.

Held, also, that damages for wrongful dismissal may be sued for and covered as "wages."

Held, also, that the suit might be instituted at St. Catharines.

The petition was filed at St. Catharines on behalf of the aintiff, who was a master mariner residing there, against e steam barge *W. B. Hall*, a British ship registered at St. atharines, belonging to the intervening defendant, William all, of Toronto. On 3rd January, 1888, the vessel, which as laid up at Toronto, was there arrested.

On 17th January, 1888, the defendant moved to set aside the service of the petition and the arrest of the vessel, on the grounds (1) that the Court had no jurisdiction, the claim being under $200; (2) that if the Court had jurisdiction the proceedings should have been taken in the Court at Toronto.

On 26th January, 1888, the motion was argued before SENKLER, Sur. J., and at his request afterwards re-argued.

H. H. Collier, for the motion. The Court has no jurisdiction where the master's claim is under $200: The Merchant Shipping Act, 1854, ss. 188-191; The Inland Waters' Seamen's Act, R. S. C. c. 75, s. 34; *The Rajah of Cochin*, Swa. 473; *The Mary Anne*, L. R. 1 Ad. & Ec. 8; *The Milford*, Swa. 362; *The Monarch*, 3 Stuart's V. A. R. 349; *The Margaretta Stevenson*, 2 Stuart's V. A. R. 195.

The contract in question is a "special" contract, and therefore the Court has no jurisdiction: *The Harriet*, Lush. 285.

R. Gregory Cox, contra, cited .

As to the master's maritime lien for wages and disbursements: *The Sara*, L. R. 12 P. D. 58; *The Fairport*, L. R. 8 P. D. 48; *The Ringdove*, L. R. 11 P. D. 120; *The Feronia*, L. R. 2 Ad. & Ec. 65; *The Daring*, L. R. 2 Ad. & Ec. 260.

As to damages for wrongful dismissal being recoverable as "wages:" *The Great Eastern*, L. R. 1 Ad. & Ec. 384; *The Northumbria*, 3 Asp. 562; *The Blessing*, L. R. 3 P. D. 35; *Pritchard's* Digest, 2296; *Williams & Bruce*, Ad. Pr., 2nd ed., 191-2; *The Ferret*, L. R. 8 App. Cas. 329; *The Camilla*, Swa. 312.

He also argued that the restriction on suits for wages contained in the 189th section of the Merchant Shipping Act does not apply to this case for the following reasons:—

1. This suit is not a suit for wages, but a cause of "wages and disbursements," which could not have been instituted under the Merchant Shipping Act, without the aid of the Vice-Admiralty Courts Act, 1863, 26 & 27 V. c. 24, s. 10 (2), Imp.

2. The restrictions contained in the Merchant Shipping Act have been removed by the extended powers given to the Courts by the Vice-Admiralty Courts Act referred to.

3. Section 109 of the Merchant Shipping Act, 1854, excludes from the application of section 189 vessels registered in the colonies, when they are within the jurisdiction of their respective governments, and masters of such vessels.

4. Section 34 of the Inland Waters' Seamen's Act, R. S. C. c. 75, is by the Act expressly confined to seamen and apprentices.

5. The investigation of master's accounts is not a fit subject for the summary jurisdiction conferred upon Justices of the Peace by sections 30-33 of the Inland Waters' Seamen's Act.

The remaining authorities cited are mentioned in the judgment.

SENKLER, Sur. J. :—This is an application by the defendant, the owner of the *W. B. Hall*, to set aside the service of the petition herein, and the arrest of the vessel, her tackel, apparel, and furniture, on the ground that this Court has no jurisdiction to entertain the petition or arrest the vessel, and on the further ground that if the Court has jurisdiction the proceedings should have been commenced in and the warrant issued from the Court in Toronto, and on other grounds disclosed in the affidavit filed.

The plaintiff claims in his petition that he was engaged by the defendant as master of the *W. B. Hall* for the season of 1887 at $100 per month; that he performed the duties of master upon the vessel from the 11th April to the 22nd November, when without just cause the defendant discharged the plaintiff and removed him from the vessel and violently assaulted him; that he made various disbursements for the vessel while master, and that there is now due to him, as such master, a balance of wages and disbursements of $150, and that he is also entitled to $250 damages for wrongful dismissal.

The defendant did not cite any authority in support of his contention that the action should have been brought in Toronto, and I know of none. If it should be that it would be better to try the case there, an order could be made under Rule 157 to that effect.

He urges, however, that this Court has no jurisdiction to entertain the claim for wrongful dismissal, and that there is

no real claim in respect thereof, or that at most so small a claim that if it is added to the $150 for wages, the total claim of the plaintiff would not amount to $200, and that the plaintiff's remedy is by proceeding in a summary way before the County Judge or Magistrate, as pointed out by the Inland Waters' Seamen's Act, and that section 34 of that Act deprives this Court of jurisdiction in a suit for wages for less than $200. He also referred to the Merchant Shipping Act, 1854, as establishing the same ground of objection, and claims that section 191 of this Act extends the operation of the sections of the Inland Waters' Seamen's Act to masters of vessels.

I think the defendant wrong in his contention that damages for wrongful dismissal cannot be claimed in this Court in suits for wages. See *The Great Eastern*, L. R. 1 Ad. & Ec. 384; *The Blessing*, 3 P. D. 35.

This being the case, it is questionable how far, when the action is entered for more than $200, I can enter into a preliminary investigation as to whether this may not be reduced to a smaller sum in the proceedings in the suit so as to deprive the Court of jurisdiction. In *The Nymph*, Swa. 86, Dr. Lushington held this could not be done. In that case the action was entered in the sum of £54. 15*s*. 2*d*., claimed for wages. In the present case the claim for wages actually earned is only $150, and the larger sum of $250 is asked as damages for wrongful dismissal on the 22nd November, about at the end of the season (*f*). It seems to me that the defendant ought to have an opportunity to test the *bona fides* of the plaintiff's claim, and I allowed Mr. Collier to examine the plaintiff on oath. This examination shewed that the claim for wages earned is not more than $150, and the plaintiff could not contradict positively the defendant's assertion that it was really only $131.03, and he expressed his willingness to accept that sum. It also appeared that, by the terms of the defendant's letter engaging the plaintiff, the defendant reserved the right to dismiss the plaintiff at any time he chose, and that the plaintiff entered upon his agreement in pursuance of this letter. I

(*f*) This sum was inserted in compliance with the practice of stating the claim large enough to cover the probable costs in order in the event of success to avoid the necessity of a re-arrest for costs.—Rep.

think under these circumstances I may properly consider the application as if the case was entered for a less sum than $200.

The defendant then refers to the Inland Waters' Seamen's Act, s. 34, which reads that "No suit or proceedings for the recovery of wages under the sum of $200 shall be instituted by or on behalf of any seaman or apprentice belonging to any ship subject to the provisions of this Act in any Court of Vice-Admiralty or in the Maritime Court of Ontario or in any Superior Court, unless," under certain circumstances which do not exist in the present case; and when it is pointed out that the only persons prohibited by this section, and to whom a summary remedy is given by section 30, are "seamen and apprentices," and that by section 2 of the Act it is enacted that in that Act the expression "seamen" includes every person employed or engaged in any capacity on board any ship, except master and pilots. He contends that section 191 of the Merchant Shipping Act, 1854, which enacts that "every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages, which, by that Act, or by any law or custom, any seaman not being a master has for the recovery of his wages," extends the meaning of sections 30 and 34 of the Inland Waters' Seamen's Act to masters of vessels, and that the effect of this is to deprive this Court of jurisdiction in a suit by a master for wages, when the amount sued for is less than $200, as well as in such a suit by a seaman.

To appreciate properly the cases which have been cited by counsel, and to which I shall refer, it may be well to review briefly the legislation on the subject of Admiralty and Maritime Courts.

The Maritime Court of Ontario has, as to the matters over which it is given jurisdiction, "all such jurisdiction as belongs in similar matters, within the reach of its process to any existing British Vice-Admiralty Court:" 40 V. c. 21, s. 2, and R. S. C. c. 137, s. 13.

British Vice-Admiralty Courts have (apart from statutes) only the ordinary admiralty jurisdiction as it existed before 3 & 4 V. c. 65, and their jurisdiction was not extended by the Act: *The Australia*, Swa. 480; *The Rio Tinto*, L. R. 9 App.

Cas. 356. Their jurisdiction was, however, extended by the Vice-Admiralty Courts Act, 1863, which Act now regulates the jurisdiction of these Courts. Section 10 of this Act defines the matters in respect of which these Courts shall have jurisdiction, and amongst them are "claims for seamen's wages," and "claims for master's wages, and for his disbursement on account of the ship."

By the general maritime law seamen serving under the ordinary mariners' contract have a lien on the ship and freight for their wages, and have enjoyed the right of suing in the Court of Admiralty to enforce the same. The master had no such lien, nor could he sue in these courts for his wages until a right to do so was given him by statutes. The first right given him was by 7 & 8 V. c. 112, s. 16, and merely allowed masters in case of bankruptcy or insolvency of the owner of the ship the same remedy as seamen in regard to the recovery of wages due from the owner of any ship, being a British subject. But by the Merchant Shipping Act, 1854, s. 191, it is enacted that "every master shall have, so far as the case permits, the same rights, liens, and remedies for the recovery of his wages, which by that Act or by any law or custom any seaman not being a master has for the recovery of his wages," and provides for the court investigating and settling the whole account in case of a set-off or counter-claim being set up.

It was held by Dr. Lushington in *The Rajah of Cochin*, Swa. 473, that this Act applies to the colonies, and that this section gives the master a lien for his wages in the Vice-Admiralty Court, whatever may be the municipal law of the colony.

This section follows sections 188, 189, and 190 of the Act, and appears to be grouped with them under the heading, "Mode of Recovering Wages" in the third part of the Act. Section 188 gives a summary remedy to any seaman or apprentice by suit before two Justices of the Peace for his wages when they do not exceed £50.

Section 189 prohibits any suit being brought in any Court of Admiralty, or Vice-Admiralty, Court of Session in Scotland, or Superior Court of Record in any of her Majesty's Dominions for the recovery of wages under £50, except under certain circumstances.

Section 190 prohibits any seaman engaged for a voyage or engagement which is to terminate in the United Kingdom from suing abroad for his wages except under certain circumstances.

Then section 191 gives the rights to masters already mentioned.

By section 109 of the Act, it is enacted that the various provisions of the third part of the Act shall have the application therein set forth, unless the context or subject matter requires a different application, and the result of the section is (so far as that part of the said third part of the Act which relates to rights to wages and remedies for the recovery thereof is concerned) that it applies to ships registered in any part of Her Majesty's Dominions abroad, and to the owners, masters, and crews of such ships, *when such ships are out of the jurisdiction of their respective governments.*

The whole of the said third part applies to all sea-going ships registered in the United Kingdom, (with some few exceptions) and to all ships registered in any British possession and employed in trading or going between any place in the United Kingdom and any place or places not situate in the possession in which such ships are registered, and to the owners, masters, and crews of such ships respectively wherever the same may be.

Under this Act in England, as soon as the amount claimed for wages appeared to be under £50, the Court of Admiralty declined jurisdiction: *The Harriet*, Lush. 285; *The Blakeney*, Swa. 428; *Williams & Bruce*, Ad. Prac., 2nd ed., 203, note (Q). In *The Blakeney* it was also held, that by the combined effect of sections 189 and 191, the restrictions applied to suits by masters as well as to suits by seamen.

It is considered by Williams & Bruce (see the page and vol. above referred to) that section 189 of the Merchant Shipping Act, 1854, was undoubtedly repealed by section 10 of the Admiralty Court Act, 1861, as that section gives the High Court of Admiralty jurisdiction over any claim by a seaman for wages and also over any claim by a master for wages and disbursements, with the proviso, that if the plaintiff does not recover fifty pounds he shall not be entitled

to costs unless the Judge certifies it was a fit case to be tried in that Court.

I have not found any case since that Act in which the High Court of Admiralty has declined to try a suit for wages wherein the amount claimed was under fifty pounds.

This Act confers powers on the High Court of Admiralty by name, and does not mention Vice-Admiralty Courts, and therefore cannot be held to extend to the latter Courts. See the remarks of Dr. Lushington in *The Rajah of Cochin*, at page 475.

The Vice-Admiralty Courts Act, 1863, enacts (as already mentioned) that Vice-Admiralty Courts shall have jurisdiction over "claims for seamen's wages," and over "claims for master's wages and for his disbursements on account of the ship." It does not, however, contain the proviso as to costs in the event of less than £50 being recovered, and there is not the same reason for holding that it impliedly repeals section 189 of the Merchant Shipping Act, 1854, as is afforded by the language of section 10 of 24 V. c. 10, and it has been held by the Vice-Admiralty of Quebec in *The Margaretta Stevenson*, 2 Stuart's V. A. R. 192 (tried in 1873) that the 189th section of the Merchant Shipping Act, 1854, extended the admiralty jurisdiction in suits for wages by master and mariner, when the sum due was less than £50 sterling, and it was expressly held by the same Court in *The Royal*, 3 Stuart's V. A. R. 326 (tried in 1883) that the Vice-Admiralty Courts Act, 1863, had not in any way affected or repealed the 189th and 191st sections of the Merchant Shipping Act, 1854, but that these sections still remained in full force, except so far as they were affected by the Seamen's Act, 1873, (which came into force on the 27th March, 1874), and it was held that by this Act these sections were so far repealed as to reduce £50 sterling to $200, with reference to vessels registered in the Provinces of Quebec, Nova Scotia, New Brunswick, and British Columbia, but remained in full force as respects all other vessels which have been made subject to them.

The decision of the Privy Council in *The Ferrett*, L. R. 8 App. Cas. 329, decided in 1883, sustains this view, as it clearly assumes that sections 189 and 191 of the Merchant

Shipping Act, 1854, were in force in the Vice-Admiralty Court of Melbourne, in which Court the case was first tried.

It seems singular that in the judgment of the Court in *The Margaretta Stevenson* no reference is made to section 109 of the Merchant Shipping Act, 1854, and it is not stated where the ship was registered. It does appear that the owner, Mr. Molson, resided in Montreal, and it also seems that the ship was engaged upon the St. Lawrence, as the engagement was for the season of navigation of that river, from which it would be likely that the ship was registered at Montreal or Quebec. This is not necessarily the case of course, and possibly the ship was registered in England. But if it was registered in the Province of Quebec, and was in that Province at the time the suit was brought, it was not within the class of vessels to which by section 109 that part of the Act which relates to wages and remedies for the recovery thereof applies. No question appears to have been raised on this point, and the case seems to have been decided as if there was no doubt as to the application of section 189 to it.

When the case of *The Royal* was tried, the question of the application of section 189 was of less importance because the "Seamen's Act, 1873," was then in force, and by sections 52 to 59 of that Act similar remedies of a summary kind and similar restrictions to them given by sections 188 to 190 of the Merchant Shipping Act, 1854, are given to seamen and apprentices, and to masters of ships registered in any of the Provinces of Quebec, Nova Scotia, New Brunswick, and British Columbia. No reference was however made in that case to section 109 of the Merchant Shipping Act, 1854.

This question would not arise in England, as by section 109 the whole of the third part of the Act applies to ships registered in the United Kingdom with only trifling exceptions.

It would almost seem that in *The Margaretta Stevenson* section 109 was not brought to the notice of the Court. Had it been, something would surely have been said about it. It can be hardly doubted that the effect of section 109 is to exclude from the operation of the several portions of the third part of the Act ships of other classes than those to which section 109 enacts that those portions shall respectively apply. Any other construction would make the careful

and elaborate enumeration in section 109 idle and without meaning.

I see nothing in the context or subject-matter to take sections 188, 189, or 190 out of the operation of section 109 under the proviso in that section. These sections simply give certain remedies under certain circumstances and restrain other remedies. Section 191 goes much further than the preceding sections. It gives to masters not only remedies but rights and liens, and gives not only that which seamen have by that Act, but what they have by any law or custom. I cannot doubt that this section has a wider meaning than the preceding ones, and was intended to have a general application.

I have referred to these cases of *The Margaretta Stevenson* and *The Royal*, because the late learned Judge of this Court in the case of the tug *Robb* tried before him in 1880, came to a different conclusion, and held that the Merchant Shipping Act, 1854, was not to be read in connection with the Vice-Admiralty Courts Act, 1863, and that the Maritime Court of Ontario had jurisdiction over *any* claim for wages. This case is reported in vol. 17 of the Canada Law Journal at page 66. where not only the judgment of the learned Judge, but the arguments of counsel were given at length, and although section 189 of the Merchant Shipping Act is referred to and discussed, there is no reference to section 109.

The learned Judge had previously to this decision promulgated Rule 276 of the Maritime Court of Ontario (approved by the Governor General in Council on the 21st November, 1879), by which it is ordered that unless the sum adjudged to a claimant or claimants on a petition in a cause of wages or necessaries amounts to the sum of $100 at least, no costs shall be allowed, unless the judge thinks fit to allow a sum of $10 in lieu of all costs.

In view of the decision of the Privy Council in the case of *The Ferret* it will be difficult to follow the opinion of the learned Judge in the tug *Robb* that the Vice-Admiralty Courts Act, 1863, impliedly repeals section 189 of the Merchant Shipping Act, 1854, but his judgment may be sustained on the ground that as the *Robb* was registered in Ontario and

was in Ontario when the suit was brought, section 189 of the Merchant Shipping Act, 1854, was prevented by section 109 from applying to her. This result is pointed out by Mr. Alfred Howell in an article published in the 4th vol. of the *Canada Law Times* at page 213, in which the question is ably dealt with.

The next change requiring notice was made by the Act of the Parliament of Canada 45 V. c. 34, by the 2nd section of which it is enacted that "Seamen and other persons engaged on board a ship on any river, lake, canal, or inland water in which the whole or part is in Ontario, *in addition to* any other remedy they may have in that behalf, may recover their wages in the mode and manner provided by the Seamen's Act, 1873, for the recovery of seamen's wages, and with the like remedies for enforcing payment."

This Act was passed after the decision in the tug *Robb*, and of course after the promulgation of Rule 276 of the Maritime Court, and the remedy given is expressly *in addition to* any other remedy seamen may have, and this Act contains no clause prohibiting actions for less than $200. The remedy given is an additional one, not a substituted one.

It may also be remarked that this Act contains no clause giving masters the same remedies, etc., as seamen, answering to section 191 of the Merchant Shipping Act, 1854, or to section 59 of the Seamen's Act, 1873.

In the Revised Statutes of Canada s. 2 of 45 V. c. 34 is referred to as being partly consolidated in sections 30, 31, 32, 33, 34, and 35 of the Inland Waters' Seamen's Act, R. S. C. c. 75. These sections are, however, in substance the same as sections 52 to 57 both inclusive of the Seamen's Act, 1873, and section 34 prohibits the bringing any suit or proceeding for the recovery of wages under $200 by any seaman or apprentice in any Court of Vice-Admiralty, or in the Maritime Court of Ontario, or in any Superior Court, under certain specified conditions of fact similar to those mentioned in the Merchant Shipping Act, 1854, section 189, and it is not said in section 30 that the remedy there given is an addition to any other remedy the seaman may have, as stated in 45 V. c. 34, s. 2.

There seems no doubt that a seaman or apprentice cannot now sue in the Maritime Court for wages under $200, except under special circumstances mentioned in section 34.

By section 2 (c) the expression "seamen" includes every person employed or engaged in any capacity on board any ship *except masters* and pilots.

This Act does not contain any section giving to masters the same remedies which a seaman has, similar to section 191 of the Merchant Shipping Act, 1854, or to section 56 of the Seamen's Act, chapter 74 of the Revised Statutes of Canada, which is almost the same as the Seamen's Act, 1873, and in this respect fails to follow the last named Act.

Upon considering these Acts it appears to me that the provisions of sections 30 to 35 of the Inland Waters' Seamen's Act could not be held to apply to masters unless section 191 of the Merchant Shipping Act, 1854, could be said to affect them and extend their meaning, and I directed a new argument on this point.

The words of this section are that "Every master of a ship shall, so far as the case permits, have the same rights, liens, and remedies for the recovery of his wages which by this Act, or by any law or custom, any seaman, not being a master, has for the recovery of his wages."

This no doubt gives to a master in future all the rights, liens, and remedies which a seaman had at the time the section became law, but does it also give any other right which a seaman may thereafter acquire?

Mr. Collier for the defendant argued that it did, and referred to the case of *The Mary Ann*, L. R. 1 Ad. & Ec. 8, as showing that section 191 extended the meaning of subsequent Acts. In that case it was held that as section 191 gave to a master a maritime lien for his wages and also allowed him to sue for his disbursements in certain cases, i.e., when a set-off or counter-claim was set up by the defendant, and the Court has held that in such cases he had a lien for the balance due him, and as the Admiralty Courts Act, 1861, gave him a right to sue for both wages and disbursements, the effect of the two Acts was to give him a maritime lien for both wages and disbursements, which was to be preferred to a mortgage. I must say this case does not seem to me in point. In it the later Act refers to the master in terms, and gives him a more

extensive remedy than the earlier Act had done, and it was held that reading it with the former Act it also gave him a more extensive lien than the former Act did.

In the present case, in the later Act (the Inland Seamen's Act, sections 30 to 35) the master is not mentioned, only seamen, and the interpretation clause excludes masters from being within the meaning of the word "seamen;" these sections give the master nothing, and to hold that the word "seamen" in them includes masters by force of section 191 of the Merchant Shipping Act, in spite of the interpretation clause, is a construction for which I can find no warrant either in any decision of the Courts or in any rule of construction.

It is of course possible that the omission of a clause giving the master the same right as a seaman, similar to that in the Seamen's Act, is by mistake. It is certainly difficult to imagine any reason for its being left out. However in its absence, I feel constrained to hold that masters are not precluded by the Inland Waters' Seamen's Act from suing for less than $200 wages in this Court, and I must dismiss the application.

It will of course be understood that this decision applies only to vessels registered in Ontario. Vessels registered in other possessions of the Crown and attached in the Maritime Court of Ontario are subject to the Merchant Shipping Act, 1854, and come under the restriction in sections 189 and 191 of that Act, and neither master nor seamen can sue for wages when the amount is less than £50.

I however give the defendant two weeks to file his answer.

Costs of this application will be costs in the cause.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [10TH JANUARY, 1888.

CARTER v. GRASETT.

Easment—Light from adjoining tenement—Express or implied grant—Registration—Discharge of mortgage, effect of—Finding of jury—New trial.

The plaintiff was the owner of lot 8, and the defendant of the adjacent lot 9. At the time the plaintiff's lot was conveyed to him, it had a house upon it with windows looking over lot 9, which was then vacant, and was also the property of the plaintiff's grantors, subject to a mortgage. The equity of redemption in lot 9 was afterwards conveyed to one through whom the defendant acquired title; and G., the immediate predecessor in title of the defendant, satisfied the mortgage and obtained and registered a discharge of it. Buildings were erected on lot 9 by the defendant and his predecessors, and the plaintiff complained of the interference by such erections with the access of light to his house on lot 8, contending for an express or implied grant of light over lot 9, and invoking the principle that a grantor cannot derogate from his grant.

Held, reversing the judgment of the Common Pleas Division, 11 O. R. 331, that by payment of the mortgage and registration of the discharge G. did not acquire a new and independent estate such as would have the effect of enabling him to derogate from the grant of light, if any, made to the plaintiff by their common grantors.

Booth v. *Alcock*, L. R. 8 Ch. 663, and *Lawlor* v. *Lawlor*, 10 S. C. R. 194, distinguished.

In answer to the question, Did the defendant's house interfere injuriously with the light of the plaintiff's house? the jury answered, Yes, but not injuriously.

Held, OSLER, J.A., dissenting, that there should be a new trial in order to have a clear finding as to the light.

Per OSLER, J. A., that the finding of the jury plainly was that the defendant's house did not interfere injuriously with

the light, and, looking at all the circumstances, the justice of the case would not warrant the granting of a new trial.

Held, also, *per* PATTERSON, J. A., and FERGUSON, J., that there was an express grant to the plaintiff by the conveyance to him of lot 8, which was under the Short Forms' Act, of all light used and enjoyed with the house; but

Per PATTERSON, J. A., that upon the evidence the defendant's house intercepted no light to which the plaintiff was entitled.

Per BURTON and OSLER, JJ. A., that the grant of light was an implied one, the conveyance of the house carrying with it all these incidents necessary to its enjoyment which it was in the power of the vendors to grant; and the general words in the conveyance did not enlarge or limit the grant.

Per BURTON, J. A., that by his conveyance the plaintiff became entitled to the enjoyment of the right to the light from the vacant land to the same extent as it was enjoyed by his grantors at the time of the conveyance.

Held, also, *per* PATTERSON, J. A., that the conveyance to the plaintiff was as regards lot 9 unregistered; and the defendant should be allowed to set up the registry laws as a defence at the new trial directed.

McCarthy, Q.C., and *George Bell*, for the appellant.
Robinson, Q.C., and *D. T. Symons*, for the respondent.

IN CHAMBERS.

[OSLER, J. A., 5TH APRIL, 1888.

ARCHER v. SEVERN.

Security—Appeal to Supreme Court of Canada—Amount—R. S. C. c. 135. s. 46.

The Court has no discretion to increase the amount of security on appeal to the Supreme Court of Canada, fixed by R. S. C. c. 135, s. 46, at $500, because of the number of respondents, or for any other reason.

H. Cassels, for the defendant.
Snelling, *Walter Barwick*, and *W. M. Douglas*, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[STREET, J., 27TH FEBRUARY, 1888.

In re ROBERTSON AND TOWNSHIP OF NORTH EASTHOPE.

Municipal corporation—Drainage by-law—Municipal Act, 1883, ss. 570 et seq.— Majority of land-owners — "Mechanical operations" — Notice— Allowance of lump sum for roads—Duties of engineer.

Upon a motion to quash a by-law providing for the assessment of certain owners of land for the cost of drainage work for the benefit of their land, under ss. 570 *et seq.* of the Municipal Act, 1883;

Held, 1. That the petition of land owners for such by-law should include a majority of all the persons whom the engineer finds to be benefited by the proposed work.

Re Romney and Mersea, 11 A. R. 712, and *Re Dover and Chatham*, 12 S. C. R. 321, followed.

2. That the engineer is at liberty to leave out of his scheme portions of the land mentioned in the petition, and the calculation as to the necessary majority should be made without considering the owners of such land.

3. That a petitioning land-owner has the right to withdraw his lands from the scheme before action has been taken under the engineer's report, and that if he does so he should not be reckoned as a petitioner in making the calculation *Re Misener and Wainfleet*, 46 U. C. R. 457, followed.

4. But even where, applying these principles, it is determined that the proper proportion of persons interested have not petitioned, a by-law valid on its face, passed by the council without objection, and under a *bona fide* belief, concurred in at the time by all parties concerned, that they had been properly set in motion, should not be quashed.

5. The words "mechanical operations," in s-s. 8 of s. 570 of the Municipal Act, must not be read in their widest sense; the provisions of the sub-section, requiring a two-thirds majority, are not intended to apply to every case in which it

nay become necessary to build or heighten a bank at the side of a drain, or to strengthen it in places by the addition of imber or logs.

6. The applicants to quash the by-law, having followed in heir application the notice given by the council under s. 572 o intending applicants, should not be prejudiced because hat notice was incorrect; the council must be held to their wn notice.

7. The allowance in the engineer's report of a lump sum s "chargeable to municipality for roads" was sufficiently lefinite, there being only one municipality concerned.

Re Essex and Rochester, 42 U. C. R. 523, distinguished.

8. The engineer, having himself made an inspection of ach lot, and estimated how much each would be benefited y the drain, might properly delegate to an assistant the uty of making a calculation upon the basis established by im.

Lash, Q.C., and *J. E. Harding*, for the applicants.
Idington, Q.C., for the township.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 1ST MARCH, 1888.

WANTY v. ROBINS.

echanic's lien—Equitable interest in land—Fraudulent scheme to evade lien —Notice—Registry Act—Innocent purchaser.

A. and P. agreed to sell certain land to B., and one of the rms of the agreement was that B. should start building at ıce. B. commenced to build, and W., the plaintiff, was his ontractor, who did certain work, but had to cease working ecause he was not paid; the last of the work being done nd August. While this work was going on, C. W. entered to negotiations with B. to purchase the rear part of the nd, which fell through, but an understanding was subse- ıently arrived at by which B. was to release to A. and P. s right of purchase, and C. W. was to purchase the whole

of the land from them, and at the expiration of thirty days convey the front part to B. The release was executed, and the deed from A. and P. was taken, not to C. W., but to the defendant A. M. W., who was C. W.'s wife. The deed was dated 30th August, and registered the following day, and the plaintiff's lien was registered 15th September. It was found by the trial Judge that C. W. and A. M. W. had notice of the plaintiff's claim before the date of the deed, and that the deed to A. M. W. was a scheme to defeat the plaintiff's claim.

Held, affirming the decision of ROBERTSON, J., that the plaintiff's lien attached on the interest of A. M. W. The law that a lien which arises by virtue of being employed and doing work on land is, if not registered, liable to be defeated by the owner conveying to a subsequent purchaser who registers his conveyance, must be restricted to an *innocent* purchaser who is entitled to the protection of the Registry Act.

T. P. Galt, for the plaintiff.

A. G. McLean and *R. L. Fraser*, for the defendant Wood.

WHALLS v. LEARN.

Married woman—Infant—Avoiding conveyance—Restitution—Laches.

The plaintiff, being an infant married woman, borrowed money from the defendant G. on a mortgage of fifty acres of land owned by her, and with that money purchased ten acres of land, which was subject to a mortgage. She then made an exchange with the defendants L. and G., by which she conveyed to them her equity of redemption in the fifty acres, in consideration of a release of her and her husband's covenants in the mortgage, and a conveyance of three acres from L., which was also subject to a mortgage. The mortgages on the ten acres and the three acres both having come into the hands of one S., he made her a further advance and a a new mortgage was made to him for the whole amount, and the old mortgages discharged. S. then discovered that the plaintiff was under age, and took proceedings to have the discharges cancelled and the old mortgages reinstated, in

which proceedings the official guardian intervened on behalf of the plaintiff as an infant, and the result of which was a compromise in the interest of the infant, and afterwards, with the approval of the guardian, she and her husband being unable to redeem, an order was granted vesting the equity of redemption in S. on the payment of $100, which was paid.

In an action to set aside the deed of the fifty acres on the ground of infancy,

Held, reversing the decision of ROSE, J., that the plaintiff should be allowed to recover back the fifty acres on payment of the mortgage money obtained from G. and interest, and the value of the three acres which she received as the consideration of the conveyance of the fifty acres, and that the short delay of two months and thirteen days should not without more bar the plaintiff.

Per BOYD, C.—By the law the disability attaching to a *feme covert* who is an infant is not removed so far as the infancy is concerned; in that respect both sexes are alike incompetent. But apart from infancy she may deal with her land as a *feme sole*. The effect of the legislation is to give to the conveyances of married women who are infants the same characteristics as are by law attributed to the conveyances of male infants, *i.e.*, if such deeds are of benefit to the infant, or operate to pass an estate or interest, they are regarded as voidable only and not mere nullities. The plaintiff cannot have the aid of the Court without making complete restoration to the defendants of the specific or equivalent value of that which she received from them during non-age.

F. E. Hodgins, for the plaintiff.

J. M. Glenn, for the defendants.

BOYD v. SULLIVAN.

Contract—Goods not all deliverable at once—Payment, when due—Refusal to pay for part delivered—Refusal to deliver remainder.

The plaintiff and defendant entered into the following contract: "To G. M. B. (plaintiff), please deliver me at Port Arthur five head good steers on first *City* up, and six steers and heifers on second trip *City* up, and four cows on same trip,

also one hundred good lambs in lots of fifteen or twenty of $3 each lamb, to dress not less than ten pounds per quarter, price of cattle $3.50, weighed at Port Arthur." Nothing was said as to time of payment.

Held, reversing the decision of ARMOUR, C.J., that the price was not payable till completion of the whole contract, and that the refusal of the defendant to pay for the part delivered did not justify the plaintiff in refusing to deliver the remainder.

Per FERGUSON, J.—The contract being entire, and containing no stipulation regarding the manner or time of payment, the defendant was entitled to refuse to pay for the part that had been delivered until the remainder should be delivered, and the refusal of the plaintiff to deliver the remainder was not justified, and was a breach of the contract.

Per BOYD, C.—If the contract is entire, the price was not payable until all the deliveries were completed: if it is divisible *quoad* the cattle and the lambs so as to be in effect two contracts, the failure to pay for the cattle by the one party would not excuse the other in not forwarding the lambs within the time limited. When there has been part delivery and consumption of that part and failure to perform the rest of the contract, the seller has the right to sue as upon a *quantum meruit*, and the purchaser has his cross-action or counter-claim for damages, and such is the position of affairs in this case.

Withers v. *Reynolds*, 2 B. & Ad. 882, considered and distinguished.

Aylesworth, for the appeal.

D. Morrison, contra.

[ROBERTSON, J., 24TH FEBRUARY, 1888.

In re COLLITON AND LANDERGAU.

Will, construction of—Devise—Restraint on alienation—Estate tail.

A testator by his will provided as follows: "I leave and bequeath to my lawful wedded wife, M. E., all my personal property, as also the sole control and management of my

real estate * * * said estate being composed * * * I leave and bequeath the aforesaid estate to my son J. C. after my wife's death * * * and the said estate is not to be sold or mortgaged by my son J. C., but is to belong to his heirs; should my son J. C. die without heirs then the estate * * *. * * my daughters shall get their maintenance oft said estate during * * . I also bequeath the sum of $80 to each of my daughters * * * to be paid out of the said estate by my said son J. C." Upon an application under the Vendor and Purchaser Act,

Held, that J. C. took an estate in fee tail in remainder after an implied life estate in his mother, M. E., subject however to the charges of the several legacies to each of the testator's daughters.

W. H. Moore, for the vendor.

L. M. Hayes, for the purchaser.

In re TRAYNOR AND KEITH.

Will, construction of—Devise—Estate limited to heirs but not to assigns—Fee simple.

A devise in a will was worded as follows: "I also will and bequeath to my daughter, L. A., the land and premises on which she now lives, and being all the land in said locality now owned by me, to her and her heirs, but not to their assigns." L. A. married and had issue. Upon an application under the Vendor and Purchaser Act,

Held, that she took an estate in fee simple.

D. A. Givens, for the vendor.

E. H. Britton, for the purchaser.

IN CHAMBERS.

[BOYD, C., 19TH MARCH, 1888.

HURST v. BARBER.

Discovery—Rule 235—Preliminary issue.

In an action against the defendants, as executors and residuary legatees under a will, for a declaration that the will should not be admitted to probate on the ground

that it was altered after execution, and for administration and partition:

Held, that the case came within Rule 235, and until the plaintiffs established the alteration charged, they were not entitled to discovery of instruments affecting the estate of the testator.

Bain, Q.C., for the plaintiffs.
Hoyles, for the defendants.

ADAMSON v. ADAMSON.

Jury notice—Equitable issues—C. L. P. Act, s. 257—Disagreement of jury—New trial.

Where equitable issues are raised a jury is not of right but of grace under sec. 257 of the C. L. P. Act.

And where, in an action, brought under an order of the Court made in a former action, to try the plaintiff's right as against the now defendants to the possession of certain lands recovered in that action, equitable issues were raised, and the case had been once tried before a jury who had disagreed:

Held, that an order striking out the jury notice was properly made.

J. Maclennan, Q.C., for the plaintiff.
Osler, Q.C., for the defendants.

[THE MASTER IN CHAMBERS, 3RD APRIL, 1888.

IMPERIAL LOAN CO. v. BABY.

Discovery—Examination of appraiser of loan company as an officer.

Held, that a local appraiser of the plaintiffs who had made a valuation of certain land upon which the plaintiffs advanced money, and in respect of which they were suing the defendant for an alleged fraudulent scheme conceived and carried out to induce them to advance more money than the land was really worth, was an officer of the plaintiffs examinable for discovery.

E. B. Brown, for the plaintiffs.
Aylesworth, for the defendant.

[4TH APRIL, 1888.

RICH v. STARK.

Examination of witness—Right of litigant to be present—Special examiner's chambers—Cross-examination of litigant on affidavit.

Upon an interpleader application the claimant Rich took out an appointment for the cross-examination of the claimant Singer upon his affidavit filed on the application, and the claimant Singer took out an appointment for the examination at the same time and place of one Morphy as a witness upon the motion.

On the return of the appointment before a special examiner on the 28th March, 1888, counsel for Singer proposed to first examine Morphy, but counsel for Rich objected to this if Singer was allowed to remain in the room. Counsel for Singer insisted that his client should be allowed to remain in the room to instruct him, and that he had a right to be present as a party. Counsel for Rich did not object to his remaining during Morphy's examination if he first submitted himself to cross-examination upon his affidavit; but this Singer refused to do.

The examiner ruled that Singer was entitled to be present during the examination of Morphy, but adjourned the examination till the point should be determined upon a motion.

Shepley, on behalf of Rich, moved "for an order that the claimant Jacob Singer do attend at his own expense to be cross-examined upon the affidavit filed on his behalf on the pending motion herein, and that the said claimant Jacob Singer do pay the costs of and incidental to the attendance in the examiner's office on the 28th day of March instant, and do also pay the costs of this motion, on the ground that it was not proper that the said claimant should have insisted, before submitting to cross-examination upon his said affidavit, upon the examination of one Ernest W. Morphy, a witness in his behalf, being proceeded with, and on the further ground that it was not proper for the said claimant to insist upon being present during the examination of the said witness without having previously submitted himself to cross-examination upon his said affidavit." He contended that the affidavit made by Singer was equivalent to an examination in chief, and that he should not be

allowed between that and his cross-examination to hear the evidence given by another witness.

E. T. English, for Singer, contra.

THE MASTER IN CHAMBERS agreed with the contention advanced on behalf of Rich, and made the order as asked, except as to costs, which he directed should be costs to the successful party in the proceedings.

NEW BRUNSWICK.

In the Supreme Court.

In re GALLAGHER.

Consol. Statutes c. 100, s. 35—County valuator—Appointment for three years—Ceasing to possess qualification—Ground of removal—Quo warranto—Certiorari.

The appointment of a county valuator under s. 35, c. 100, Consol. Statutes, being for three years, the county council has no power to displace him on the ground that since his appointment he has ceased to possess the necessary property qualification.

It is sufficient on an application for a *quo warranto* against a person for exercising a municipal office, to shew that he has been appointed to the office by proper authority and has signified his acceptance of it, without shewing that he has performed any of the duties, or taken the oath of office.

Where it was claimed that a person had been illegally removed from a municipal office, and another person appointed in his stead, a *certiorari* was granted to bring up the proceedings for the purpose of quashing them, as well as a *quo warranto* to try the right of the appointment.

HANNIGAN v. BURGESS.

Canada Temperance Act—Summary conviction—Distress warrant—Seizure under—Proceedings in right of the Crown—Replevin—Removal from County Court under Consol. Statutes c. 37, s. 201—Certiorari—Goods in custody of the law.

A distress to enforce payment of a fine upon a conviction under the Canada Temperance Act, is not a proceeding in

right of the Crown—the fine being payable by the Dominion Statute, 49 V. c. 48, and the Order-in-Council made thereunder, to the local authority bearing the expense of enforcing the law.

Goods seized under a distress warrant for non-payment of a fine imposed by a conviction, are not repleviable by the person against whom the distress issued, unless the magistrate who issued it acted without jurisdiction.

If an action of replevin brought in a County Court is improperly removed into this Court under the Consol. Statutes c. 37, s. 201, the plaintiff should move to set aside the order for removal.

Quære, whether an order to remove can be made *ex parte*.

RECTOR OF ANDOVER v. KENNEDY.

Landlord and tenant—Tenancy at will—Statute of limitations—Ancestor and heir—Continuity of possession—Church corporation where no rector appointed—Evidence—Certified copy of deed under Consol. Statutes c. 74, s. 14—Affidavit—Omission to state the place of swearing.

Land was granted by the Crown in 1837 to certain officials to hold in trust, to be conveyed to the several corporations of the Church of England in the parishes where the lands were situated, when such corporations should be established, as glebes for the use of the rectors or ministers of such parishes. By Act 9 V. c. 17 the churchwardens and vestry of every church then or hereafter to be erected in the Province should, when elected, be a corporation by the name of the rector, churchwardens, and vestry of the parish to which they belonged; and in case of the death or absence from the Province of any rector, or where no rector had been appointed, the churchwardens and vestry should have the same power and authority as were given to rectors, churchwardens, and vestry; and that all suits and proceedings by them should be done and prosecuted in the name of the rector, churchwardens, and vestry. Prior to 1849 a church had been built in the parish of Andover, and a missionary clergyman of the Church of England appointed to the parish. Churchwardens and vestrymen were elected for the parish in the year 1850, and

generally in each succeeding year up to the time of bringing this action.

In the year 1850 B. went into possession of the land in dispute by permission of one of the vestrymen of the parish, and continued in possession until the time of his death in March, 1869, acting as sexton of the church, and taking care of it. His widow and children remained in possession after his death—the widow taking care of the church, as her husband had done. In November, 1869, the widow entered into a written agreement with the missionary in charge of the parish, by which she agreed to pay a nominal rent for the land in question to the rector of the parish for one year. She remained in possession for ten years, taking care of the church as before, and then went away, leaving one of her children, the defendant, in possession.

In 1871 the lands which had been granted in trust, as above, were by Act of Assembly vested in the Diocesan Church Society on the same trusts; and in the following year (1872) the Church Society conveyed the land in dispute to the lessor of the plaintiff. A certified copy of the deed was put in evidence under the Consol. Statutes c. 74, s. 14, upon an affidavit of the vestry clerk of the corporation, stating that the original deed was not in his possession, and he did not know where the same could be found. Affidavits to the same effect were made by the missionary of the parish, and by the churchwardens and vestrymen, with the exception of one who had left the Province.

Held, 1. That though no rector had been appointed to the parish, the election of churchwardens and vestrymen created a corporation by the terms of the Act; that the title to the land vested in such corporation by the deed of the Church Society, and that they could sue in the name of the rector, churchwardens, and vestry.

2. That if B. was a tenant at will of the plaintiffs and not a mere servant, their right of entry not being barred at the time of his death in 1869, the entry of the missionary in charge in that year, and leasing the land to the widow, determined such tenancy at will, and destroyed the continuity of possession from B. to the defendant, and prevented the operation of the statute of limitations.

3. That the fact of the rent being reserved to the rector of the parish by the agreement with the widow, did not alter the effect of that agreement, and that it enured to the benefit of the corporation.

3. That the affidavit of the vestry clerk of the non-possession of the original deed was sufficient to admit the certified copy as evidence; WETMORE, J., dissenting.

5. That the jurat of an affidavit sworn before an attorney of this Court, being a commissioner for taking affidavits, need not state the place where it was sworn; ALLEN, C.J., dissenting.

STAR KIDNEY PAD CO. v. McCARTHY.

Foreign judgment—Action on—Service of process out of jurisdiction of foreign Court—Appearance by defendant in original action—Consol. Statutes c. 48.

In an action on a foreign judgment it is a good plea under the Consol. Statutes c. 48 that the defendant was not served with process in the suit in which the judgment was obtained, within the jurisdiction of the foreign Court; that the contract on which the judgment was obtained was not made within the jurisdiction of that Court; nor was the defendant residing therein either at the time the contract was made, or when the suit was commenced; and that he never was indebted to the plaintiff in the claim on which the judgment was obtained; even though the defendant had appeared in that action; WETMORE, J., dissenting.

DALE v. O'BRIEN.

Pleading—Landlord and tenant—Distress—Fraudulent removal—Assault and battery—Plea justifying assault only.

To a declaration stating that the defendant assaulted and beat the plaintiff, whereby he became sick and wounded, and was for a long time unable to transact his business, and incurred expense for medical attendance; the defendant pleaded that before the alleged trespass, the plaintiff held the premises as the defendant's tenant, and that a certain amount of rent being in arrear, the plaintiff fraudulently removed his goods, to prevent the defendant from distraining

them, whereupon he, within thirty days thereafter, seized the goods as a distress for the arrears of rent; that after the defendant had so distrained, the plaintiff without paying the said rent, wrongfully attempted to carry away the said goods by force, and was in the act of carrying them away when the defendant for the purpose of holding them as a distress, gently laid his hand on them while they were in the plaintiff's possession, doing no more harm than was necessary for the purpose, whereupon the plaintiff voluntarily gave up the goods to the defendant, which are the alleged trespasses.

Held, 1. That the battery was not mere matter of aggravation, and that the plea was bad, as it neither confessed nor justified the battery.

2. That the plea need not show that sufficient goods were not left on the premises to satisfy the arrears of rent.

Quare, whether the plea should have shewn that the tenant was in possession, or that the lease was subsisting at the time of the distress.

In re LYNOTT.

Prohibition—County Court—Several causes of action—Separate suits—Costs.

Where there are distinct causes of action, amounting in the whole to a sum beyond the jurisdiction of the County Court, the creditor may separate them and bring two actions in that Court; WETMORE AND TUCK, JJ., dissenting.

The Court may grant costs in discharging a rule *nisi* for a prohibition.

GEROW v. PROVIDENCE WASHINGTON INS. CO.

Foreign company—Action against—Pleading.

In an action on a policy of insurance issued by a foreign company, it is not necessary to state in the declaration how they were incorporated, or that they had power to enter into the contract, or to sue and be sued; PALMER, J., dissenting.

Supreme Court of Canada.

ONTARIO.] [15TH MARCH, 1888.

MOXLEY v. CANADA ATLANTIC R. W. CO.

Railway company—Sparks from engine—Lapse of time before discovery of fire—Presumption as to cause of fire—Defective engine—Negligence.

A train of the defendants passed the plaintiff's farm about 10.30 a.m., and another train passed about noon. Some time after the second train passed, it was discovered that the timber and wood on the plaintiff's land was on fire, which fire spread rapidly after being discovered, and destroyed a quantity of the standing wood and timber on the land.

In an action against the company it was shown that the engine which passed at 10.30 was in a defective state, and likely to throw dangerous sparks, while the other engine was in good repair and provided with all necessary appliances for protection against fire. The jury found, on questions submitted, that the fire came from the engine first passing, that it arose through negligence on the part of the company, and that such negligence consisted in running the engine when she was a bad fire thrower and dangerous.

Held, affirming the judgment of the Court of Appeal, 14 A. R. 309, that there being sufficient evidence to justify the jury in finding that the engine which passed first was out of order, and it being admitted that the second engine was in good repair, the fair inference, in the absence of any evidence that the fire came from the latter, was that it came from the engine out of order, and the verdict should not be disturbed.

Chrysler, for the appellants.

McCarthy, Q.C., and *Mahon*, for the respondents.

SEYMOUR v. LYNCH.

Indenture—Construction of—Lease or license—Authority to work mine.

In an indenture describing the parties as lessor and lessees respectively, the granting part was as follows: "Doth give, grant, demise and lease unto the said (lessees) the exclusive

right, liberty, and privilege of entering at all times for and during the term of ten years from 1st January, 1879, in and upon (describing the land) and with agents, labourers, and teams to search for, dig, excavate, mine, and carry away the iron ores in, upon, or under said premises, and of making all necessary roads, etc., also the right, liberty, and privilege to erect on the said premises the buildings, machinery, and dwelling-houses required in the business of mining and shipping the said iron ores, and to deposit on said premises all refuse material taken out in running said ores." There was a covenant by the grantees not to do unnecessary damage, and a provision for taking away the erections made and for the use of timber on the premises, and such use of the surface as might be needed.

The grantees agreed to pay twenty-five cents for every ton of ore mined, in quarterly payments on certain fixed days, and it was provided how the quantity should be ascertained. It was also agreed that the royalty should not be less than a certain sum in any year. The grantees also agreed to pay all taxes and not to allow intoxicating drinks to be manufactured on the premises, or carry on any business that might be deemed a nuisance. There were provisions for terminating the lease before the expiration of the term and a covenant by the lessor for quiet enjoyment.

In an interpleader issue, where the lessor claimed a lien on the goods of the lessees for a year's rent due under the said indenture by virtue of 8 Anne c. 14, s. 1.

Held, per RITCHIE, C.J., and HENRY and TASCHEREAU, JJ., that this instrument was not a lease, but a mere license to the grantees to mine and ship the iron ores, and the grantor had no lien for rent under the statute.

STRONG, FOURNIER, and GWYNNE, JJ., contra.

The Court being equally divided the appeal was dismissed without costs.

The Court of Appeal, 13 A. R. 525, 7 C. L. T. Occ. N. 149, having been also divided, the judgment of the Queen's Bench Division that the instrument was a lease, stands.

Northrup, for the appellants.

Clute, for the respondents.

CLARK v. ODETTE.

THE "MARION TELLER."

Salvage—Special contract—Action by agent of owners.

The *Marion Teller* was aground near the shore of Lake Erie, and was towed off by a tug. The plaintiffs, who managed the tug on commission, sued in their own names for remuneration for such salvage services, and the Maritime Court awarded them $1,110, finding that there was a special contract made by which the master of the rescued vessel agreed to pay $10 an hour for such services.

Held, reversing the judgment of the Maritime Court, that the plaintiffs being neither owners of, nor mariners nor passengers on board of, the tug, could not sue in their own names for such salvage.

R. Gregory Cox, for the appellants.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

CH. D.] [6TH MARCH, 1888.

MOORE v. CITIZEN'S FIRE INSURANCE COMPANY.

Insurance—Fire—Over-value—First statutory condition—Several insurances—Change of one policy—Notice.

The plaintiff being owner of a quantity of railway ties and timber, effected insurances thereon with three companies to the amount of $4,000, and subsequently, with the knowledge and through the agency of H., the person acting on behalf

of the several companies, effected an additional insurance of $1,200 on the same property in the Fire Insurance Association. H. acted as agent for that company also, and he made the necessary entries thereof on the three first policies. In consequence of the Fire Association having ceased to take risks on that kind of property, H. asked the plaintiff for the interim receipt of that company, which he gave up accordingly, and H. substituted one in the Gore District Company for it, he being agent for that company also; but omitted to give any notice or make any entry as to the substitution of the Gore insurance for that of the Fire Association.

In an action to recover the amount of the insurances, after a destruction of the property by fire:

Held, affirming the judgment of the Court below, that this was not such an omission on the part of the plaintiff as invalidated the policies; in this, following *Parsons* v. *The Standard Ins. Co.*, 43 U. C. R. 603; 4 A. R. 326; 5 S. C. R. 233.

In effecting insurances in all to the amount of $5,200, the plaintiff represented the property as being of "the cash value" of $5,339 on two occasions, and $5,500 on a third occasion. In an action on the policies the jury found that the value was $4,000 when first insured, and $4,200 when the additional insurance was effected; that the plaintiff had misrepresented the value, but not intentionally or wilfully; that it was not material that the true value should be made known to the company; and that the company intended that the goods should be insured to their full value, and rendered a verdict in favor of the plaintiff for $3,100, which the Divisional Court subsequently refused to set aside.

Held, in this reversing the judgment of the Court below, that under the circumstances and in view of the nature of the goods insured, the over-value was such as, under the first statutory condition in the policy, rendered the same void.

Osler, Q.C., and *Wallace Nesbitt*, for the appellants.
Laidlaw Q.C., and *Kappele*, for the respondent.

[Since carried to Supreme Court of Canada.]

WILSON, C.J.] [10TH JANUARY, 1888.

LONDON AND CANADIAN L. & A. COMPANY v. MORPHY.

Stock exchange, sale under process of seat at—Sequestration—Parties.

The plaintiffs recovered judgment against the defendants M. & N., both of whom were members of the Toronto Stock Exchange, each owning a seat at the board thereof. The seats at that board, it was considered, could not be sold under *fi. fa.*, and an application was made to the Queen's Bench Division for an order to sell the seats, which had been seized under a sequestration, which was refused by Wilson, C.J., whereupon the plaintiffs appealed, and on the argument it was made to appear that M. had paid off the judgment of the plaintiffs, and was carrying on the appeal for the purpose of obtaining the seat owned by N. This Court, under the circumstances, and aside from the fact that the ultimate completion of title to a purchaser could only be effected by the contingent co-operation and assent of the Stock Exchange, as provided by its by-laws, affirmed the judgment appealed from, without prejudice to any right M. might have to procure himself to be substituted for the plaintiffs.

Arnoldi, for the appellants.
Ritchie, Q.C., for the Toronto Stock Exchange.
W. Mortimer Clark, for the respondent Niven.

BOYD, C.] [30TH JANUARY, 1888.

BEATY v. SHAW.

Mortgage—Executor and trustee—Void discharge of mortgage—Payment for improvements—Mistake of title.

H. by his will appointed F. and W. executors and trustees of his estate. F. for the purpose of securing a debt due by him to the estate, executed a mortgage to W. W. died intestate, and F. five years subsequently having agreed to sell the mortgaged premises to M., executed a statutory discharge of the mortgage, which he expressed to do as sole surviving executor, and conveyed the estate to M.

Held, affirming the judgment of BOYD, C., 13 O. R. 21; 7 C. L. T. Occ. N. 63, that the act of F. in executing such discharge had not the effect of releasing the land from the mortgage.

Held, also, in this reversing the same judgment, that M., the purchaser from F., and his assigns, were not entitled to any lien for improvements on the land during their occupancy thereof.

J. C. Hamilton and *Alan Cassels*, for the appellant.

Bain, Q.C., for the respondents.

High Court of Justice.

SITTINGS FOR TRIALS.

[STREET, J., 5TH APRIL, 1888.

REGINA v. SAMO.

Criminal law—Forgery—Corroboration.

The prisoner was a furniture dealer on Yonge street, Toronto. Euphemia Fenwick in 1884 purchased goods from him to the value of $63,—not paid.

The prisoner discounted in the Central Bank a note for $136, dated 1st August, 1887, and purporting to be signed by Mrs. Fenwick. This note was alleged to be a forgery, and the prisoner was tried for such forgery at the Toronto sittings of the High Court of Justice (criminal side), before STREET, J., and a jury.

Mrs. Fenwick denied making the note, and her denial was corroborated by the evidence of her son, who swore he knew her signature. An agreement containing an authority to Samo to sign Mrs. Fenwick's name to notes, and purporting to be signed by her was then put into the son's hands, and he

stated his belief that the signature to it was that of his mother: she was recalled, and denied having signed the agreement.

STREET, J.—The agreement, if genuine, contained a power of attorney under which the prisoner might lawfully sign Mrs. Fenwick's name to promissory notes, and if he wrote her name under the authority of the power so given, he could not be convicted of forgery. Mrs. Fenwick denied signing both the note and the agreement: her denial of her signature to the note was corroborated; but her denial of her signature to the agreement was not. This was a matter upon which corroboration is required, and there is therefore no evidence to go to the jury: see R. S. C. c. 174, s. 218.

The prisoner was accordingly discharged.

Irving, Q.C., for the Crown.

Bigelow and *Murdoch*, for the prisoner.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 9TH MARCH, 1888.

BERTRAM v. MASSEY MANUFACTURING CO.

Sale of goods—Contract—Delivery of part—Absence of brand—Quality of goods—Testing—Acceptance—Property in part not delivered.

The plaintiffs agreed to deliver to the defendants a quantity of Staffordshire crown bar iron of the T. K. brand. A part of the iron was delivered to the defendants, of which a considerable quantity was unbranded; the defendants, however, did not treat the absence of the brand as creating a difficulty in the way of their accepting the iron, but proceeded to test it, and finding it unsatisfactory declined to receive any more, or to pay for the whole or part. This action was then brought for the contract price of the whole. The jury found that the iron was merchantable. but not equal in quality to the standard T. K. crown brand.

Held, that the duty of the plaintiffs under the contract would have been performed if they had supplied to the defendants merchantable iron bearing on its face the genuine brand contracted for; but in the absence of that authentication, and having regard to the conduct of the defendants, the contract must be taken to be one for the sale of iron manufactured by the T. K. Co. of the quality usually indicated by the crown brand, and so the defendants would have the right to test it, and according to the findings of the jury would have been justified in rejecting it all; and the fact that the portion which was branded was below the standard did not estop the defendants from shewing that the portion which was unbranded was also below the standard. But

Held, that the defendants, having used in the manufacture of their machines, after the doubtful quality of the iron had been brought to their notice, and without the consent of the plaintiffs, a considerable quantity of what had been delivered to them as part of an entire contract, had precluded themselves from objecting to the remainder of that which came into their possession.

Held, also, that the property in the part of the iron which was not delivered to the defendants must be taken to remain in the plaintiffs, for the defendants had never exercised their right to test it, and had refused to receive it, and until tested the plaintiffs could not compel the defendants to accept it.

The action was treated as one for the price of iron which the defendants accepted, and for damages arising from their refusal to accept the remainder; and, in accordance with the findings of the jury, which in the opinion of the Court were sustained by the evidence, judgment was entered for the plaintiffs for the actual value of the part of the iron delivered only, (the damages having been negatived by the jury); and for the defendants upon their counter-claim for damages sustained from the breach of contract other than by reason of the inferior quality of the iron.

Robinson, Q.C., and *Lash*, Q.C., for the plaintiffs.

McCarthy, Q.C., *Watson* and *J. M. Clark*, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 25TH JUNE, 1887.

REGINA v. LEE.

Canada Temperance Act—Police magistrate appointed for county exclusive of city—Right to sit in city to hear offence occurring in county—Appointment "during pleasure"—Necessity for place set apart to hear offences—Alternative jurisdiction—Constitutional law—Appointment of police magistrates.

On 17th November, 1886, G. was appointed by the Lieutenant-Governor of Ontario, police magistrate for the county of Brant, exclusive of the city of Brantford, during pleasure. On 14th March, 1887, an information was laid before him, as such police magistrate, charging that the defendant at the township of South Dumfries, in the county of Brant, on 31st day of January, 1887, contrary to the Canada Temperance Act, did unlawfully sell intoxicating liquors, etc., upon which G. issued, at the city of Brantford, a summons requiring the defendant to appear at his G.'s office, "Court House, Brantford," before him, or such justices of the peace for the said county as may then be there, to answer said charge. On an application for a prohibition to restrain G. from hearing the complaint,

Held, by ROBERTSON, J., that under 49 V. c. 4, s. 9, G. had authority to hear, adjudicate, and determine the matter of the complaint at the city of Brantford.

Held, also, that G.'s commission was properly issued during pleasure; and that it was not necessary under s-s. *b.* of s. 103 of the Canada Temperance Act, that the town of Paris should be excluded from the operation of the commission, but *quære*, whether the police magistrate could try an offence arising within the said town.

Held, also, that there was nothing in the statute which required the police magistrate to exercise the functions of his office at a police court set apart and appointed by law therefor. However, a room in the Court House was set apart by the county council when not required for other purposes; and also under 48 V. c. 17, s. 4, G. had the right to occupy the court room.

Quære, whether it was intended that G. should hear the complaint, or whether there was power to give alternative jurisdiction to do so; but this was not a ground for prohibition.

Held, also, that the appointment of police magistrates is not *ultra vires* of the Legislature of Ontario.

Regina v. *Bennett*, 1 O. R. 445, followed.

On appeal to the Divisional Court, the judgment was affirmed.

Mackenzie, Q.C., for the appeal.

Delamere, contra.

[11TH FEBRUARY, 1888.

GREEN v. TOWNSHIP OF ORFORD.

Municipal corporation—Drainage—Work done in excess of contract—Necessary work—Liability of corporation.

A by-law, founded on the usual petition, etc., was passed by the defendants for the drainage of certain lands in the township, and a contract therefor, under the defendants' corporate seal, was entered into with the plaintiff for the construction of the drain. The depths required were marked on the profiles forming part of the contract. Between certain points, where the deepest excavation was required, the drain was to be tiled and covered. After the plaintiff had proceeded some distance between these points, the defendants' engineer, under whose personal direction the work was being done, discovered that the depths were inaccurately given and that the drain was not deep enough between these points, and he directed that the drain should be deepened, and the tiles, so far as laid, taken up and re-laid at the increased depth, thereby occasioning to the plaintiff considerable work beyond that provided for by the contract. It was proved that this was absolutely necessary, for without it the drain would be useless. No formal resolution of the council was passed authorizing this work to be done, nor was there any contract therefor under the corporate seal.

Held, that the defendants were liable for the value of the work.

Moss, Q.C., and *Shoebottom*, for the plaintiff.

Douglas, Q.C., for the defendants.

RYAN v. McKERRILL.

Promissory note—Third person becoming party after maturity without consideration—Liability—Indorsement of payment of interest on note—Extension of time for payment—Discharge of surety.

Where, after a note is completed, so far as the intention of the parties is concerned, it is signed by a third person, or is so signed by him after maturity without any consideration moving directly to such third person, or any agreement to extend the time for payment, such third person is not liable.

An indorsement on the back of a note of the payment of interest up to a future date, beyond the maturity of the note, in the absence of evidence of mistake, is deemed an extension of time for payment of the note to such date so as to discharge a party thereto who is merely a surety for the payment thereof.

Crofts v. *Beale*, 11 C. B. 172, followed; and *Currie* v. *Misa*, L. R. 10 Ex. 153; 1 App. Cas. 554; and *McLean* v. *Clydesdale Banking Co.*, 3 App. Cas. 95, distinguished.

Aylesworth, for the plaintiff.

Houston, for the defendant.

BRUNELL v. CANADIAN PACIFIC RAILWAY COMPANY.

Master and servant—Railway—Accident—Negligence—Workmen's Compensation for Injuries Act—49 V. c. 28, s. 3, s-s. 5.

B., the plaintiff's son, was employed as fireman on a locomotive engine which was in charge of a driver named R., B. being under his orders. B. was severely scalded by the bursting of the boiler of the engine, which resulted in his death. The accident was apparently caused by the sudden

influx of cold water into the boiler, which had been allowed to run too low. There was no evidence to shew to whom the negligence was attributable; but it was proved that, though the company held the driver responsible as regards the engine, it was the duty of the fireman, for which he was responsible to the company, to attend to the supply of water, which was part of his education to fit him for the superior position of driver, and that from his position he had greater facilities for opening the valve than those possessed by the driver; and from a report put in by one of the defendants' officials it appeared that B. had charge of the water at the time of the accident. In an action against the defendants for damages under the Workmen's Compensation for Injuries Act, 49 V. c. 21, s. 3, s-s. 5,

Held, that the defendants were not liable.

J. K. Kerr, Q.C., and *Carson*, for the plaintiff.

G. T. Blackstock, for the defendants.

BETTS v. SMITH.

Contract—Tenders—Evidence of prior agreement—Guarantee—Reference to advertisement.

The defendants acting as a committee to superintend the reception of a large number of persons, and being desirous in addition to providing accommodation for them, to make a profit for themselves, advertised for tenders in a newspaper, in which it was stated that there would be a large number of persons present at the proposed assemblage for whom meals would be required, and tenderers were invited to submit a bill of fare which they would guarantee to furnish for $1 a day, and the tenders were to state what amount would be paid for such privilege. The plaintiff was applied to personally by M., one of the committee, to know whether he would tender, and certain statements as to the number of persons to be present were then made to him, and other particulars of defendants' requirements were given to him, his attention being called to the above advertisement, which, however, he did not see. He subsequently saw one B., by whom the

tenders were to be received, who had been sent to him by M., and who, in addition to the particulars already mentioned, stated that they would guarantee 1,500 persons a day, but would require plaintiff to provide for 2,000. The plaintiff then wrote his tender, by which he was to get 75 cents a day for every three meal ticket, and the committee were to charge $1, which tender was accepted in writing. Very few persons took their meals from the plaintiff, who, in consequence, lost a large amount by the contract.

At the trial the advertisement and requirements were put in as evidence for the plaintiff, subject to objection.

In an action to recover the amount of plaintiff's loss from the defendants,

Held, MACMAHON, J., dissenting, that the tender and acceptance constituted the whole contract; and there was nothing in them to render the defendants liable.

Per MACMAHON, J.—The advertisement and requirements must, under the circumstances, be incorporated into the tender and acceptance, and so form part thereof as to render the defendants liable.

McNeely v. *McWilliams*, 13 A. R. 324, and *Lindley* v. *Lacey*, 17 C. B. N. S. 578, commented on.

Lount, Q.C., for the plaintiff.

Bigelow, for the defendants.

McGILL v. WALTON.

Malicious prosecution—Reasonable and probable cause—Evidence of—Non-statement of full facts to solicitor and police magistrate.

The plaintiff at Brantford having corresponded with the defendant at Hamilton, as to purchasing ice, the defendant on 7th September notified the plaintiff by telegram that the ice would not be sent unless the plaintiff telegraphed money to cover freight and ice, to which the plaintiff answered that the money was paid to the Express Company, and to send a full car, which was done. No money had, however, been paid to the Express Company. On 9th September the defendant telegraphed the plaintiff asking what he meant.

The plaintiff replied that he had paid the bank the day before, and to send a car for Monday morning. The defendant, relying on this representation, shipped same to the plaintiff on the following day. The plaintiff had on 9th September deposited $30.00 with a bank in Brantford to the defendant's credit, supposing it would be transmitted to the defendant, which was not done. On 1st October the defendant wrote the plaintiff that unless he sent the full amount of account the defendant would have to take criminal proceedings. On 7th October the defendant not having received a reply from the plaintiff, consulted his solicitor, who, the defendant said, advised that the plaintiff was guilty of a criminal offence, and to have him arrested. The defendant accordingly went to Brantford, and laid information before the police magistrate, who issued a warrant under which the plaintiff was arrested. On the case coming before the police magistrate, the plaintiff's statement as to the deposit of the money in the bank was proved to be true, whereupon the magistrate stated that there was no ground for the arrest, and dismissed the case. In an action for malicious arrest the jury found that the defendant believed the plaintiff had not deposited the money with the Express Company or with the bank but that he had not reasonable grounds for so believing, and did not take reasonable means to prove the truth of the plaintiff's statement; and also that it was doubtful whether defendant truly represented the facts to his solicitor, and that he did not do so to the police magistrate.

Held, reversing the judgment of CAMERON, C.J., at the trial, that, under the circumstances, there was a want of reasonable and probable cause; and the plaintiff was entitled to recover.

McCarthy, Q.C., for the plaintiff.

Teetzel, for the defendant.

ARNOLD v. CUMMER.

Statute of Limitations—Entry by owner—Life lease to one of several in possession—Effect of.

In 1856 D. M., the then owner of certain lands, conveyed to A., who in 1861 conveyed to N., through whom the plaintiff claimed. D. M. continued in possession, and at his request

his sister M. B. came and resided with him, and took charge of the house and their sister S. M., who was subject to fits, which in some degree affected her mind, In 1862 D. M. died, the two sisters remaining in possession, M. B. taking charge and control. In 1868 the defendant, the sisters' nephew, came to reside with them, M. B. giving him charge of the place, upon which he subsequently erected buildings. In 1875 N. went upon the land in assertion of his title as owner, having previously threatened to bring ejectment, and was induced to execute a life lease in favour of M. B. and S. K., which was accepted by S. K., who executed the lease, but not by M. B., who refused to do so, S. K., M. B., and the defendant still continuing to reside on the premises. M. B. died in 1879, and S. M. in 1886. The defendant continued to reside thereon. In 1887 the plaintiff brought ejectment against the defendant, who claimed a title by possession.

Held, that N. having entered and taken possession, and placed S. M. in possession as his tenant under him, her possession was his and his successors' in title, and therefore the plaintiff was entitled to recover.

Pegley, for the plaintiff.

Atkinson, Q.C., for the defendant.

FORWARD v. THE CORPORATION OF THE CITY OF TORONTO.

Municipal corporation—Ice on sidewalk—Water running down lane in front of sidewalk and freezing—Evidence of negligence.

By reason of ice on the sidewalk on Yonge Street, in the city of Toronto, the plaintiff, who was walking along that street about six o'clock in the afternoon, slipped and fell, sustaining damage. The place in question was in front of a lane which ran between two stores, the walls of the stores forming the sides of the lane, which sloped towards the sidewalk, the ice being caused by the water from rain and melting snow running down the lane on to the sidewalk and then freezing. There was ice on the sidewalk at the time of the accident, but there was no evidence of its having accumulated there, nor did it appear how long it had been there.

Held, that there was no evidence of negligence on the part of the defendants.

J. K. Kerr, Q.C., for the plaintiff.

Robinson, Q.C., and *McWilliams*, for the defendants.

[ROSE, J., 13TH DECEMBER, 1887.

WILKINSON v. HARVEY.

Sheriff—Liability of execution creditors for wrongful seizure—Solicitor and client—Liability for acts of solicitor.

The defendants, who lived in Hamilton, and had a claim against W. at Ingersoll, issued a writ therefor through their solicitors C. &. B., which was served by C., who went to Ingersoll under special instructions from the defendants to do so, and to take such steps as they might think best to recover the claim. A judgment was afterwards obtained, and an execution against W.'s goods issued. The sheriff sent his officer to execute the writ, who was informed by W. that he had no goods, which the officer believed to be true, and so informed the sheriff, who accordingly notified C. & B. C. & B. refused to accept this; and wrote the sheriff in effect that he had acted improperly in not seizing the goods on *ex parte* statements, and that he must take such action as would enable him to test the truth of the statements he had acted on. The sheriff then seized the goods, and applied for an interpleader order. The goods were proved to be the plaintiff 's in an action to recover damages occasioned by the seizure.

Held, that the sheriff must be assumed to have seized under the circumstances, under instructions from the defendants' solicitors, and as the solicitors were acting under special instructions from the defendants, the latter were liable to the plaintiff.

Smith v. *Keal*, 9 Q. B. D. 340, distinguished.

G. T. Blackstock and *Walsh*, for the plaintiff.

P. D. Crerar, for the defendants.

[ROBERTSON, J., 6TH DECEMBER, 1887.

COUNTY OF VICTORIA v. COUNTY OF PETERBOROUGH.

Municipal corporations—Adjoining counties—Boundary line roads—Deviations—Liability.

The counties of Victoria and Peterborough adjoin each other, and up to 1863 were united for municipal and other purposes. The boundary line road between these counties deviated in several places owing to natural obstructions. At the place in question, where the deviation was wholly in the township of Verulam, in the county of Victoria, and was recognized as a deviation from the boundary line, two bridges were built during the union at the joint expense, and were treated as subject to the joint control and liability. By 42 V. c. 47, which came into force on 1st March, 1880, a portion of the township of Harvey, in the county of Peterborough, adjoining Verulam, including the part adjacent to Verulam, was detached from Harvey and joined to Verulam for municipal and other purposes, as if it had always been part of Verulam. In 1879 a new bridge was built at the same place, and an arbitration had between the counties, and on the 18th May, 1880, after the Act came into force, an award was made settling the defendants' share of the cost, which they paid. In 1887, the bridges having got into disrepair, the plaintiffs appointed an arbitrator to settle the cost of repair, etc., but the defendants refused to join in the arbitration, contending that since the Act no liability therefor was cast upon them. The inhabitants of certain portions of the adjoining township in Peterborough continued to use these bridges, which were their only means of access to the county town and market.

Held, that the road at this place must still be considered the boundary line road, and the defendants were liable for the maintenance and repair of the bridges.

Moss, Q.C., and *Hudspeth*, Q.C., for the plaintiffs.
Lash, Q.C., and *E. B. Edwards*, for the defendants.

[10TH JANUARY, 1888.

THE CORPORATION OF THE TOWNSHIP OF OXFORD v. GAIR.

Principal and surety — Municipal corporation—Bond—Release of surety—New bond.

A bond, intended to be a joint and several bond, was drawn up, to be executed by G., the plaintiffs' treasurer, and by L. and A., as his sureties. A. executed the bond on the 16th December, 1886, on the supposition and understanding that it should not be binding on him until executed by the others. On 27th December, to enable him to run as a councillor, A. requested the council to release him from the bond, which was agreed to, and on the 17th January, 1887, a formal resolution was passed accepting H. as security in his place, and stating that a new bond had been executed by G., L., and H. On the same day the first bond, which had not been executed by G. or L., was then executed by them. In an action against A. on the first bond,

Held, that he was not liable thereon.

Osler, Q.C., and *Kidd*, for the plaintiffs.

French and *E. Saunders*, for the defendants.

[1ST FEBRUARY, 1888.

BRITISH CANADIAN LOAN AND INVESTMENT COMPANY v. WILLIAMS.

Mortgage—Acquirement of equity of redemption by mortgagee—Release of mortgagor—Intention—Evidence of.

The defendant executed a mortgage on certain land to the plaintiffs, 5th November, 1881, to secure $2,200 and interest, and on 8th May, 1882, conveyed the land to L. subject to the mortgage. On 12th May, 1883, L. conveyed to the plaintiffs. Afterwards the plaintiffs entered into an agreement with C. for the sale of the land to him for a sum less than the amount due them, which was followed by a conveyance to

him. Subsequently the plaintiffs brought an action against the defendant on the covenant in his mortgage to them to recover the deficiency thereon, contending that the agreement made with L., when they took the conveyance from her, was that the defendant should not be discharged thereby, as was evidenced by certain correspondence put in by them.

Held, that whether there was such an agreement or not it would not be binding on the defendant, for he having sold to L. subject to the mortgage, it was L.'s duty to indemnify him against it, and the plaintiffs took with knowledge of this and never communicated with him; and moreover by their subsequent sale to C. they put it out of the defendant's power to redeem.

North of Scotland Mortgage Co. v. *Udell*, 46 U. C. R. 511, and *North of Scotland Mortgage Co.* v. *German*, 31 C. P. 349, commented on.

J. K. Kerr, Q.C., and *J. A. Paterson*, for the plaintiffs.
J. J. Maclaren, for the defendant.

IN CHAMBERS.

[BOYD, C., 9TH APRIL, 1888.

MILLS v. MILLS.

Foreign commission — Evidence of party — Alimony action — Criminal proceedings.

There is no hard and fast rule as to the granting or refusing of a foreign commission; it is a matter of discretion; but in the case of the examination of a party being sought the Court will be more circumspect than in the case of an ordinary witness.

In an action of alimony, where there were allegations of cruelty, and the plaintiff had also instituted criminal proceedings for bigamy against the defendant, who left the jurisdiction and applied to be examined abroad:

Held, that the defendant was a necessary witness and that the reason given by him for not being able to attend the trial, viz., that he was afraid to return to the jurisdiction on account of the criminal proceedings, was sufficient; and a commission was ordered.

F. E. Hodgins, for the plaintiff.
Hoyles, for the defendant.

[16TH APRIL, 1888.

In re JACKSON, MASSEY v. CROOKSHANKS.

Infant—Defendant qua executor—Service on official guardian.

Held, that administration proceedings taken against an infant co-executor without observing the usual practice of serving the official guardian were invalid.

The provisions of the rules and general orders as to service in case of infancy apply, whether the infant be a sole or a joint defendant, and whether he be sued personally or in a representative capacity.

W. H. Blake, for the plaintiff.
J. Hoskin, Q.C., for the infant.

[18TH APRIL, 1888.

GLASS v. GRANT.

Pleadings—Summary application to set aside—Demurrer—Res judicata—Counter-claim against third party.

As a general rule pleadings should not be set aside on summary applications, unless so plainly frivolous or indefensible as to invite excision. Where a matter is doubtful or difficult it is better to leave the objecting party to demur; and even if the pleading appears to be demurrable, that is not a sufficient reason for expunging it from the record.

And where, in an action by the assignee of C. for the benefit of his creditors under 48 V. c. 26, stated to be brought for the benefit of one of such creditors, the F. Bank, to set aside a mortgage made to the defendants as fraudulent and preferential, a judgment for foreclosure of the mortgage obtained against the plaintiff was pleaded as a bar to the action, and a counter-claim was asserted for payment by the F. Bank of certain moneys alleged to be due to the defendants, a motion to strike out such defence and counter-claim was refused, and the plaintiff was left to demur.

Semble, that the counter-claim was not inadmissible.

Hellmuth, for the plaintiff.

J. Maclennan, Q.C., for the defendants.

[18TH APRIL, 1888.

HACKETT v. BIBLE.

Solicitor and client—Authority of solicitor to settle—Variation of interpleader order.

A solicitor retained to collect a debt is not entitled to interplead without a further retainer for that purpose, but being so retained he has the ordinary rights of solicitors as in other contested cases.

And where solicitors properly representing the claimant and the execution creditors in an interpleader made an arrangement by which $441 of the claim made and provided for in the interpleader order was abandoned, and the sheriff, by the direction and consent of both the solicitors, in good faith distributed $441 among the creditors entitled, and paid only the balance into Court, instead of the whole proceeds of the sale, as directed by the interpleader order, which was not amended:

Held, that the solicitors had authority to make such a variation of the order, and the sheriff was justified in acting

upon it; and it made no difference that the interpleader order was a consent order, for it was an interlocutory order, and the variation did not affect third parties.

Bain, Q.C., for the claimant.

H. J. Scott, Q.C., for the sheriff.

[ROSE, J., 6TH AND 14TH APRIL, 1888.

GIBBONS v. DARVILL.

Parties—Action to set aside conveyance as fraudulent—Grantor a necessary party.

The action was brought by a simple contract creditor of D., on behalf of himself and all other creditors, seeking to set aside as fraudulent a conveyance of land from D. to M., and asking in the alternative that M. might be ordered to pay the outstanding purchase money into Court, and that M. might be restrained from paying it to D., and D. from receiving it from M.

Held, that an *ex parte* order made at the instance of the plaintiff striking out the name of D. as a defendant was improper, and that upon the statement of claim, as framed, D. was a necessary party.

Held, also, upon an application to amend the pleading, that even if the claim were merely to set aside the conveyance, the grantor D. was a necessary party.

Shepley, for the plaintiff.

Hoyles, for the defendant McIntyre.

Supreme Court of Canada.

ONTARIO.]

In re GLENGARRY DOMINION ELECTION PETITION.

KENNEDY v. PURCELL.

Elections—Petition—Ruling by judge at trial—Appealable—Dominion Controverted Elections Act, R. S. C. c. 9, ss. 32, 33, & 50—Construction of—Time—Extension of—Jurisdiction.

Held, 1. That the decision of a Judge at the trial of an election petition overruling an objection taken by the respondent as to the jurisdiction of the Judge to go on with the trial, on the ground that more than six months had elapsed since the date of the presentation of the petition, is appealable to the Supreme Court of Canada under R. S. C. c. 9, s. 50; GWYNNE, J., dissenting.

2. In computing the time within which the trial of an election petition shall be commenced, the time of a session of Parliament should not be excluded unless the Court or Judge has ordered that the respondent's presence at the trial is necessary; GWYNNE, J., dissenting.

3. The time within which the trial of an election petition must be commenced cannot be enlarged beyond the six months from the presentation of the petition, unless an order has been obtained on application made within the six months.

An order granted on an application made after the expiration of the said six months is an invalid order and can give no jurisdiction to try the merits of the petition, which is then out of Court; RITCHIE, C.J., and GWYNNE, J., dissenting.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellant.
MacMaster, Q.C., for the respondent.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [10TH JANUARY, 1888.

WILLS v. CARMAN.

Costs—Payment of to unsuccessful party—Rule 428—Nominal damages, power of Court to give judgment for—Venire de novo.

In an action for libel the jury found that the defendant was guilty of libelling, but that the plaintiff had sustained no damage thereby. The Judge at the trial dismissed the action, but ordered the defendant to pay the plaintiff's costs, and gave the latter judgment therefor. The defendant thereupon moved in the Divisional Court against the judgment for costs, which that Court varied by ordering the action to be dismissed with costs, and the plaintiff having appealed to this Court from the judgment at the trial dismissing the action, as also from the judgment of the Divisional Court,

Held, that although rule 428 gives to the Judge or Court the power of depriving any of the parties to an action, plaintiff or defendant, of their costs, it does not confer the power of compelling a successful party to pay the costs of an unsuccessful party.

Mitchell v. *Vandusen*, 14 A. R. 517; 7 C. L. T. Occ. N. 422, considered, approved, and followed.

Held, also, allowing the appeal of the plaintiff from the judgment at the trial, that a *venire de novo* should be directed; PATTERSON, J.A., dissenting.

Per HAGARTY, C.J.O., and GALT, C.J.—No Court has or ought to have the right to direct *ex proprio motu* judgment for nominal damages where a jury has refused to award them.

Per OSLER, J.A.—Nominal damages should not be awarded, unless it clearly appear that such damages are a mere matter

of form, or that the omission to find them was accidental or unintentional or an oversight following a distinct intention to find the plaintiff's cause of action proved.

Per PATTERSON, J.A.—The jury having left no fact undetermined, the plaintiff was entitled to judgment, which might properly be entered for nominal damages with full costs.

Dickson, Q.C., for the plaintiff.

Moss, Q.C., and *Clute*, for the defendant.

[30TH JANUARY, 1888.

ERICKSON v. BRAND.

Malicious arrest—Capias ad respondendum—Necessity to set aside before bringing action—Reasonable and probable cause—Duty of Judge.

In an action for malicious arrest on the ground of want of reasonable and probable cause, to enable the plaintiff to recover it is not necessary to shew that the *ca. re.*, or the Judge's order on which the same was obtained, has been set aside.

The defendant in his application for an order for the *ca. re.* by his affidavit made out a *prima facie* case, but certain facts and circumstances, which it was alleged he was aware of, were omitted therefrom, which, it was contended, might, if stated, have satisfied the Judge granting the order that, although the plaintiff was about to depart from the Province, it was not with intent to defraud, etc. At the trial the Judge decided the question of reasonable and probable cause without leaving to the jury any question as to whether the statements in the defendant's affidavit fairly stated the case.

Held, that before deciding on the question of reasonable and probable cause, the Judge should have seen that the facts on which he ruled were either proved without contradiction, or admitted, or found by the jury; BURTON, J.A., dissentiente; PATTERSON, J.A., dubitante.

McCarthy, Q.C., and *Wallace Nesbitt*, for the appellant.

Arnoldi, for the respondent.

McMILLAN v. GRAND TRUNK R. W. CO.

Railway company—Shipment of goods to a point beyond defendants' line—Negligence—Construction of conditions of contract—R. S. C. c. 109. s. 104.

An action to recover damages for the loss of some goods consigned to be carried by the defendants from Toronto to McGregor station, on the C. P. Railway, in Manitoba, and for injury sustained by other goods by wet, and for delay in transport. The defendants' line of railway extended only as far as Fort Gratiot, Michigan, and the goods were carried the rest of the way by other companies, and were damaged and lost by the negligence of one or more of such companies.

The defendants sought to protect themselves from liability by setting up the 10th condition indorsed on the receipt given to the plaintiff for the amount paid by him for carriage, which was as follows:—"All goods addressed to consignees at points beyond the places at which the company has stations, and respecting which no direction to the contrary shall have been received at those stations, will be forwarded to their destination by public carrier or otherwise, as opportunity may offer, without any claim for delay against the company for want of opportunity to forward them; or they may, at the discretion of the company, be suffered to remain on the company's premises or be placed in shed or warehouse (if there be such convenience for receiving the same) pending communication with the consignees, at the risk of the owners as to damages thereto from any cause whatever. But the delivery of the goods by the company will be considered complete, and all responsibility of the said company shall cease, when such other carriers shall have received notice that the said company is prepared to deliver to them the said goods for further conveyance; and it is expressly declared and agreed that the said Grand Trunk Railway Company shall not be responsible for any loss, misdelivery, damage, or detention that may happen to goods so sent by them, if such loss, misdelivery, damage, or detention occur after the said goods arrive at the said stations or places on their line nearest to the points or places which they are consigned to, or beyond their said limits."

Held, that the contract of the defendants was to carry the goods to McGregor station; and in its true construction, the condition quoted applied only to the forwarding of the goods from the place to which the defendants had contracted to carry them, whether that was a place on the line of the defendants, or on a connecting railway, and had not the effect of limiting the liability of the defendants to anything occurring upon their own line.

Collins v. *Bristol & Exeter R. W. Co.*, 7 H. L. Cas. 194, followed.

Held, also, that the provisions of the Railway Act, R. S. C. c. 109, s. 104, which preclude a railway company from relieving themselves from liability by any notice, condition, or declaration, if the damage arises from any negligence, omission, or misconduct of the company or its servants, do not apply to a contract to carry goods over other lines, even though such are within the territorial jurisdiction of the Parliament of Canada.

The judgment of the Queen's Bench Division, 12 O. R. 103, affirmed, but on different grounds.

Remarks by PATTERSON, J.A., on other conditions of the contract.

Wallace Nesbitt, for the appellants.

Robinson, Q.C., and *A. C. Galt*, for the respondent.

FERGUSON, J.] [10TH JANUARY, 1888.

JAMES v. ONTARIO AND QUEBEC R. W. CO.

Railway—Expropriation of lands—Compensation—Date at which value to be ascertained—Increase in value owing to railway itself—Deviation of street.

Held, affirming the decision of FERGUSON, J., 12 O. R. 624, that in ascertaining the compensation to be made to a land-owner for land expropriated for a railway under R. S. C. c. 109, s. 8, the value of the part taken (as well as the increased value of the part not taken, which by s-s. 21 is to be set off) is to be ascertained with reference to the date of the deposit of the map or plan and book of reference, under s-s.

14, (or in this case with reference to the date of the notice or decision to expropriate), and therefore such value should include any increase which may have been caused by, or is owing to, the contemplated construction of the railway.

Semble, *per* BURTON, J.A., that what is intended by s-s. 21 is a direct or peculiar benefit accruing to the particular land in question, and not the general benefit resulting to all land-owners from the construction of the railway.

Per OSLER, J.A., that the land in question not having been taken strictly for the purposes of the railway, but after the laying down of the railway, for the purpose of deviating a street, to allow the railway to run along the original street, there was no right to set off the increased value of the land not taken caused by the construction of the railway.

Delamere and *E. T. English*, for the plaintiff.

Robinson, Q.C., and *R. M. Wells*, for the defendants.

In re ALGOMA DOMINION ELECTION PETITION. BURK v. DAWSON.

Elections—R. S. C. c. 9, ss. 32 and 33, construction of—Time for trial of petition—Extending time.

The petition was presented on the 6th May, 1887, during a session of Parliament which ended on 23rd June, and issue was joined on 3rd June; no application was made or step taken after that until the 6th December, 1887, when the petitioner applied to have a time and place appointed for trial and to have the time for the commencement of the trial enlarged.

The first part of s. 32 of the Controverted Elections Act, R. S. C. c. 9, is as follows:

"The trial of every election petition shall be commenced within six months from the time when such petition has been presented and shall be proceeded with from day to day until such trial is over; but if at any time it appears to the Court or Judge that the respondent's presence at the trial is necessary, such trial shall not be commenced during any session

of Parliament; and in the computation of any time or delay allowed for any step or proceeding in respect of any such trial, or for the commencement thereof as aforesaid, the time occupied by such session of Parliament shall not be included."

Held, PATTERSON, J.A., dissenting, that the exception in the last clause is confined to a case in which the Court is satisfied that the respondent's presence is necessary; *such trial* refers to a trial at which the respondent's presence has been declared to be necessary; and no such declaration having been made in this case, the time of the session of Parliament was not to be excluded from the six months within which the trial was to be commenced.

It was not incumbent upon the respondent to move to dismiss the petition for default.

The Court could not *nunc pro tunc* declare that the respondent's presence at the trial was necessary.

Per Curiam, that the time for the commencement of the trial may be enlarged under s. 33, notwithstanding the expiration of the six months; but it had not been established in this case that the requirements of justice rendered such enlargement necessary; and the Court refused to appoint a time and place for trial or to enlarge the time.

W. Cassels, Q.C., and *C. J. Holman*, for the petitioner.

McCarthy, Q.C., and *J. R. Roaf*, for the respondent.

[See, especially as to the last point, *The Glengarry Case*, ante p. 219.]

[PATTERSON, J.A., AND FERGUSON, J., 15TH DECEMBER, 1883, AND 16TH JANUARY, 1884.

In re WELLAND PROVINCIAL ELECTION PETITION.

HOBSON v. MORIN.

Elections—Agency, proof of—Meetings of association and committees—Corrupt practices—Illegal acts—R. S. O. c. 10, s. 159, application and construction of.

A Reform Association existed in the constituency as an organized body for bringing forward candidates and doing everything in their power to elect their nominees. B. was

present at meetings of the association, and one witness swore "he took as much part as any of us." It was not shewn that the organization was well defined, or what was necessary to constitute membership. A committee and sub-committees were appointed for the township in which B. resided, but he was not on them or any committee for election purposes. Committee meetings were held at his hotel, at which he was present, but it was not shewn that he did any more at the meetings than any hotel-keeper would do at a meeting held in his house. B. swore that with the exception of one man he did no canvassing outside his own house; he did not report to the committee meetings held at his house, because he had been doing nothing; but he gave the respondent the name of one person who wished to see him. It was not shewn that he had any authority from the respondent or any committee, or that the respondent expected his assistance, or gave him any instructions, or recognized any act done by him. At the trial it was proved that B. had been guilty of a corrupt practice without the knowledge or consent of the respondent.

D. heard of a meeting, went to it, and found about half a dozen people present going over a voter's list, in which he did not take part. It was not shewn that he had any authority from the respondent, or any committee, association, or person on his behalf, or that any act he did was recognized. It was proved that D. had been guilty of corrupt practices without the knowledge or consent of the respondent.

Held, following *The North Ontario Case*, H. E. C. at pp. 317, 323, that B. and D. were not agents of the respondent.

One corrupt act, viz., the payment of the travelling expenses of a voter, M., by F., an agent of the respondent, was proved; it was also found that C. D. was guilty of bribery in giving $1 to each of two voters, and offering money to another, but the agency of C. D. was not proved; it was also found that L. B. gave liquor at his tavern during polling hours, but his agency was not proved. It was contended that the acts of C. D. and L. B., and the acts and conduct of three other persons in connection with other charges which were not proved, should all be taken into consideration with the corrupt act of F., in order to take the

case out of s. 159 of the Election Act, R. S. O. c. 10, and prevent the respondent from saving his seat under the provisions of that section.

Held, per PATTERSON, J.A., that the "result" referred to in s. 159 is the result which touches the right to the seat which is being contested. The petitioner cannot insist on giving evidence of any corrupt practice which he has not charged, and for this purpose illegal acts are corrupt practices; but whether the evidence given upon any charge is sufficient to establish it or falls short of doing so, any facts or any course of conduct shewn by that evidence may be properly considered in connection with any other corrupt or illegal practice which has been proved, and the nature or probable extent of which it may serve to elucidate; but, on consideration of all the facts in this case, the election should be held good.

Per FERGUSON, J., that the words "other illegal practices at the election," at the end of s. 159, must be illegal practices the existence of which is ascertained and known, and that the way their existence becomes known is by the evidence; they cannot rest in conjecture, but must be proved. Whenever in giving evidence to prove a corrupt practice charged as having been committed by an agent, it appears that illegal practices took place, though the evidence fail to prove the agency, such illegal practices are comprehended in the words "other illegal practices at the election," and must be taken in connection with the proved corrupt acts of agents. On the whole case, the corrupt act proved is so trifling that the result cannot have been affected by it, either alone or in connection with the other illegal practices; and the election should therefore not be avoided.

McCarthy, Q.C., for the petitioner.

S. H. Blake, Q.C., *K. Harcourt*, and *T. D. Cowper*, for the respondent.

High Court of Justice.

CHANCERY DIVISION.

[BOYD, C., 9TH APRIL, 1888.

HARRISON v. SPENCER.

Will, construction of—Period of distribution—Thelluson Act—39 & 40 Geo. III. c. 9.

By a will of personal estate, after a life estate had been given to the testator's widow, it was provided by a residuary clause that the property should be equally distributed amongst the testator's nephews and nieces who should be alive at the time of his death. At the time of this action the widow of the testator was still alive, but some of the nephews and nieces had died.

Held, that the will gave a vested interest to such nephews and nieces as should be alive at the time of the testator's death; but the period of distribution was the death of the widow, and the bequest to the nephews and nieces was subject to be divested as to those of them who should die before the said period of distribution, in favour of their representatives, who were entitled to take in substitution for the original legatees; and for this reason it was to be inferred that by "heirs-at-law" the testator meant to express that the benefit was to go to the persons who would inherit the personal estate—that is to say, the next of kin.

Held, also, that the Act against accumulations commonly called the Thelluson Act, 39 & 40 Geo. III. c. 9, which was passed after the statute 32 Geo. III. c. 1, by which English law was introduced into Canada, and which did not extend its terms to the colonies, is not in force in this Province, where the law appears to be as it was in England before that statute.

Kilbourn and *Bishop*, for the plaintiffs.

Creasor, Q.C., and *D. Morrison*, for the defendants.

ST. THOMAS v. CREDIT VALLEY R. W. CO.

Contract—Damages for breach—Railway—Failure to run trains to point contracted for.

An appeal from the report of the Master at London assessing the damages which the plaintiffs were entitled to for breach by the defendants of their agreement to establish a station at Church street in the west end of the city of St. Thomas, and run trains from their station in the east end of the city to the station at Church street.

Held, that the case must be referred back, as the law and evidence did not warrant the conclusion to which the Master had come. The failure to keep up the station at Church street might have and might be expected to have the effect of rendering property in that neighbourhood less desirable than it would otherwise be, and though the actual depreciation is a matter which pertains to the property owners and not to the city as damages, yet the lessened taxation resulting from this depreciation is not too remote a fact for consideration upon the reference.

It is clear that the personal loss or inconvenience suffered by travellers or citizens from the abandonment of the station at Church street or the actual depreciation in value of the land individually owned in that neighbourhood could not be reckoned as constituents *per se* of the damages suffered by the corporation.

Stated broadly, the inquiry was how much less benefit had been received by the municipality by reason of the railway service at one station being discontinued, and the difficulty of ascertaining the amount was not a reason for withholding relief altogether.

If the company admitted that the station at Church street was to be given up for all future time, the damages should be assessed once for all, which might be done either by fixing one solid sum or by directing a yearly payment. The loss in taxation resulting to the city from the depreciation in taxable property which could be traced to or reasonably connected with the company's default formed a yearly standard which might be capitalized so as to fairly represent the money compensation to which the plaintiffs are entitled.

McCarthy, Q.C., and *Ermatinger*, Q.C., for the plaintiffs.

Robinson, Q.C., and *R. M. Wells*, for the defendants.

[23RD APRIL, 1888.

HEFFERMAN v. TAYLOR.

Will, construction of—Life tenant—Power to lease—Trustees.

A testator gave all his estate, real and personal, to trustees upon a trust to allow and give the use thereof to his wife during life for her support.

Held, that the wife had the right to rent the farm and deal herself directly with the tenant during her life. In this case those entitled in remainder were the adult children of the life tenant, and no active duties were cast by the will upon the trustees during the continuance of the life estate, and such being the case, the Court would give effect to the usual incidents of an estate for life, by which the tenant can occupy it or let it or otherwise dispose of it as seems best to that tenant.

Held, therefore, that a lease theretofore made by the trustees without the sanction of the widow, though there was no evidence of *mala fides* on their part, must nevertheless be set aside, and possession of the property given to the widow or her nominee.

G. W. Field, for the plaintiff.

W. Cassels, Q.C., and *Peterson*, for the defendants.

In re BROOKFIELD AND TRUSTEES OF SCHOOL SECTION No. 12, TOWNSHIP OF BROOKE.

Mandamus—Motion for in Court or Chambers—Costs—O. J. Act, s. 17, s-s. 8—R. S. O. (1877) c. 52, s. 17.

S. 17, s-s. 8, of the O. J. Act applies to motions for *mandamus*, etc., where an action is pending; but R. S. O. (1877), c. 52, s. 17, specially authorizes a summary application for a *mandamus* in Chambers.

Kincaid v. *Kincaid*, 12 P. R. 462, and *ante* p. 139, distinguished.

And where a summary application for a *mandamus* was made to the Court, costs as of a Chambers application only were allowed to the applicant, where the circumstances did not justify the imposition of a larger amount of costs than was sufficient to indicate that the respondents were in the wrong.

Snelling, for the applicant.

F. E. Hodgins, for the respondents.

[FERGUSON, J., 15TH MARCH, 1888.

BARBEAU v. ST. CATHARINES AND NIAGARA CENTRAL R. W. CO.

Railway company—Expropriation of lands—Dominion Railway Act or Provincial Railway Act—Work for general advantage of Canada—Notice.

On an application for an injunction to restrain the defendants, who were incorporated by Statutes of the Ontario Legislature, from applying to a County Judge for a warrant for possession of certain lands required by them, and being expropriated by them under the provisions of the Ontario Railway Act, on the ground that the defendants' railway had been declared a work for the general advantage of Canada, and that no notice of expropriation had been served, as required by the provisions of the Ontario Railway Act;

Held, under the circumstances of this case, and following *Clegg* v. *Grand Trunk R. W. Co.*, 10 O. R. at p. 713, and *Darling* v. *Midland R. W. Co.*, 11 P. R. 321, that the defendants were no longer within the operation of the Ontario Statutes.

Held, also, that a notice requiring the lands, given under the Dominion Railway Act, was not a sufficient notice under the Ontario Railway Act.

Robinson, Q.C., and *H. H. Collier*, for the plaintiff.

Aylesworth and *Towers*, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1888.

BLACK v. TORONTO UPHOLSTERING COMPANY.

Agreement—Manufacture of goods—"Actual first cost," meaning of.

The defendants, carrying on business in manufacturing and upholstering goods, entered into an agreement with the plaintiff, whereby the plaintiff was to manufacture all the upholstered goods sold by the defendants at an advance of 11 per cent. upon the actual first cost of goods made and shipped from Toronto; the percentage to pay cost of packing and shipping the goods, and material used as packing to be charged at cost price; the plaintiff to buy all goods required for manufacture (except such frames as the plaintiff should make himself) from the defendants; and the price charged for the goods to be understood as the actual first cost; and the actual first cost value of the goods so manufactured for the defendants to be computed from the prices charged by the defendants to the plaintiff.

Held, that under the agreement the "actual first cost" on which the plaintiff was to charge an advance of 11 per cent. was the price of the material used and the wages paid.

Lount, Q.C., and *Kean*, for the plaintiff.

Shepley, for the defendants.

CASEY v. CANADIAN PACIFIC RAILWAY CO.

Railway company—Negligence—Liability—"Train," meaning of—R. S. C. c. 109, s. 52—Obligation to ring bell.

The defendants' station at A. was on what was known as the side track, between which and the main track there was a platform for passengers alighting from and getting on to the trains on the main track. The plaintiff had come to the station to meet a friend, and ascertaining from her that she had left her overshoes in the car, he attempted to cross over the side track and reach the platform, when the engine and

tender, which had been detached from the rest of the train, and were backing down the side track to pick up a car some fifty yards distant, ran on the plaintiff and injured him. The plaintiff was looking in the opposite direction from that in which the engine and tender were coming, and therefore did not see them; and it appeared that had he been looking out, he must have seen them before he attempted to cross, and so avoided the accident, as it was only a second or two from the time he left the platform until he was struck, and there was no obstruction to his view.

Held, that the accident having been caused by the plaintiff's own negligence and want of care, the defendants were not liable.

Quære, whether an engine and tender constitute a train within s. 52 of R. S. C. c. 109, so as to require a man to be stationed on the rear car to warn persons of their approach, but in any event there was a man so stationed here, who did give warning.

Held, also, that the statutory obligation to ring the bell or sound the whistle only applies to a highway crossing, and to an engine shunting on a railway company's own premises.

James Reeve, for the plaintiff.

G. T. Blackstock, for the defendants.

PRIESTMAN v. BRADSTREET CO.

Master and servant—Wrongful dismissal—Manager of company—Speculation in margins.

The defendants carried on the business of a commercial agency, of which the plaintiff was general manager. By the terms of his engagement the plaintiff was to be paid a salary of $5,000, and was to devote his whole time, influence, and talents to the successful promotion of the business; the failure of either party to keep the agreement rendering it void. In the discharge of the plaintiff's duties in rating merchants when found speculating, their rating would be lowered. The plaintiff having engaged in speculating in margins on the stock and grain exchanges, through brokers

and bucket shops, and having sunk all his private means, and become indebted to a large extent beyond his ability to pay, and thereby brought the defendants into disrepute, was requested by them to give up speculating, which he refused to do, saying that if his doing so was a condition of his remaining with the company he would dissolve his connection therewith; whereupon he was dismissed.

Held, that the company were justified in dismissing him.

Ritchie, Q.C., for the plaintiff.

Osler, Q.C., and *Tilt*, Q.C., for the defendants,

IN CHAMBERS.

[BOYD, C., 23RD APRIL, 1888.

GUEST v. SIMPSON.

Jury notice—Mortgage action—Rectification of contract—Declaration that mortgage satisfied.

An appeal by the plaintiff from an order of the Master in Chambers refusing to strike out the defendant's jury notice.

A. McKechnie, for the appeal.

W. S. Morphy, contra.

BOYD, C.—The defendant does not appear to me entitled to serve a jury notice. The cause of action is on a mortgage, claiming a balance of $400 due thereon, and asking the usual mortgage relief. There is a further claim, on the footing of an agreement made after the mortgage was due, for the payment of interest at seven per cent.

The defence is that the agreement was obtained by fraud of the plaintiff's agent, and asks that it be rectified so as to express the true agreement, according to another instrument executed contemporaneously, and obtained from the defendant by the said agent. It sets up a payment to this agent by which the amount due is reduced to $188, and a payment is made into Court of this sum; upon this it is asked that the mortgage be declared satisfied, and that a statutory discharge or reconveyance be executed by the plaintiff; and for

the delivery up of all deeds, etc. The cause of action and the defence thereto are such as may be, and before the Judicature Act would have been, properly triable in equity. The order is set aside with costs in the cause to the plaintiff.

[8TH MAY, 1888.

HUFFMAN v. DONER.

Judgment—Combined interlocutory and final—Rules 72, 75.

Where a writ of summons is indorsed with the particulars of a liquidated demand, and also with a claim for unliquidated damages, the plaintiff may, without an order, sign a combined final and interlocutory judgment upon default of appearance. Rules 72 and 75 may be combined in a proper case, and together justify such a judgment.

Bissett v. *Jones*, 32 Ch. D. 635, followed in preference to *Standard Bank* v. *Wills*, 10 P. R. 159.

Middleton, for the plaintiff.
W. M. Douglas, for the defendant.

[GALT, C. J., 2ND MAY, 1888.

SERVOS v. TOWNSHIP OF NIAGARA.

Discovery—Examination of pathmaster as an officer of township corporation.

In an action for negligence against a township corporation for keeping a bridge in bad repair, whereby the plaintiff sustained bodily injury;

Held, affirming the order of the local Judge at St. Catharines, that a former pathmaster of the township was examinable by the plaintiff for discovery as an officer of the corporation.

Aylesworth, for the plaintiff.
W. M. Douglas, for the defendant.

[5TH MAY, 1888.

SWAIN v. STODDART.

Security for costs—Interpleader issue—Local Judge, jurisdiction of.

A local Judge, in whose county the proceedings in an action out of which an interpleader arose were carried on, and who himself made the interpleader order, has power to make an interlocutory order in the issue thereby directed.

Coulson v. *Spiers*, 9 P. R. 49, followed.

A party to an interpleader issue may be ordered to give security for costs.

The dictum of the Master in Chambers in *Canadian Bank of Commerce* v. *Middleton*, 12 P. R. 121, not approved.

Williams v. *Crosling*, 3 C. B. 956, followed.

Aylesworth, for the plaintiff.

C. J. Holman, for the defendant.

[THE MASTER IN CHAMBERS, 17TH APRIL, 1888.

MORROW v. CHEYNE.

Pleading—Action for malicious prosecution—Observations of judge at trial on criminal charge—Publication of charge.

In an action for malicious prosecution, a part of the statement of claim setting out the observations of the Judge before whom the plaintiff was tried upon the criminal charge out of which the action arose, was struck out; but a part stating damages to the plaintiff from publication of such charge in newspapers and otherwise, was allowed to stand.

C. Millar, for the plaintiff.

Shepley, for the defendants.

Supreme Court of Canada.

ONTARIO.]

McKENNA v. McNAMEE.

Contract—Consideration, failure of—Impossibility of performance.

The defendants had been contractors for the construction of certain public works in British Columbia, which the Government of the Province had taken out of their hands. Believing that they could effect its restoration, they entered into an agreement with the plaintiffs by which the latter were to complete the work and receive ninety per cent. of the profits, the defendants to be still the recognized contractors with the Government, there being a clause in the contract against sub-letting. The plaintiffs were fully aware of the state of affairs and had examined all the provisions of the contract.

One of the plaintiffs went to British Columbia and endeavoured to obtain the restoration of the contract, but failed to do so, and it not being restored, this action was brought by the plaintiffs for breach of contract to take them into their service, and claiming for damages and moneys expended in the work $125,000.

Held, affirming the judgment of the Court of Appeal, 14 A. R. 339; 7 C. L. T. Occ. N. 262; HENRY, J., dissenting, that as the agreement was made with a view to the restoration of the contract, and as such restoration failed without fault on either side, the defendants were not liable.

McCarthy, Q.C., and *Mahon*, for the appellants.

O'Gara, Q.C., for the respondents.

SMITH v. CITY OF LONDON FIRE INSURANCE CO.

Insurance—Fire— Description of property—Mutuality of contract—Estoppel —Statutory condition—Variation.

The agent of an insurance company filled in an application on behalf of S. for insurance on the building of the latter which he described as being built of boards. The word "boards" was very badly written, but the character of the

building was sufficiently designated on a diagram on the back of the application, which the agent was instructed to fill in, marking a brick building in red and a frame building in black, in this case it being marked in black. There was no special rate of premium for a building built of boards, and the rate charged to S. was that specified in the tariff of the company for a brick building, he having authority to fix such rate.

The application was sent to the head office and a policy issued thereon describing the building as brick, the word written "boards" in the application being read by mistake as "brick." The mistake was not brought to the notice of the head office until the insured premises were destroyed by fire and a claim was made for the amount of the loss under the policy, and after receiving notice of the error, the company, under a clause in the policy, caused such claim to be submitted to arbitration, but refused to pay the amount awarded to S. on the ground that, owing to the mistake in the policy, there had been no mutuality of contract between them and S., and no valid contract ever existed between them.

Held, affirming the judgment of the Court of Appeal, 14 A. R. 328; 7 C. L. T. Occ. N. 281; that there was a valid contract existing between the company and the assured, but even if there were not, the company could not set up want of mutuality after treating the contract as existing by the submission to arbitration and in other ways.

By the 17th statutory condition in the Act relating to insurance companies, R. S. O. c. 62, a loss shall not be payable until thirty days after the completion of proofs unless otherwise provided by statute or agreement of the parties.

Held, that this was a privilege accorded to the company, who could not extend the time limited by a variation of the condition under s. 4 of the above Act, though such period might be shortened.

Per STRONG, J.—That inserting a clause in a policy extending the time for payment of loss to sixty days, in the form prescribed by s. 4, is not a variation by agreement of the parties within the meaning of the statutory condition.

Robinson, Q.C., and *C. Millar*, for the appellants.

McCarthy, Q.C., for the respondent.

QUEBEC.]

MOLSON v. LAMBE.

Prohibition—Court of Special Sessions—Licensed brewers—Quebec License Act, 41 V. c. 3—Constitutionality of.

R., a drayman in the employ of J. R. M. & Bros., duly licensed brewers under 43 V. c. 19 (Q.), was charged before the Court of Special Sessions of the Peace at Montreal with having sold beer outside of the business premises of J. R. M. & Bros., but within the revenue district of Montreal in contravention of the Quebec License Act, 41 V. c. 3. On a writ of prohibition issued by the Superior Court at the instance of the appellants, claiming *inter alia* that, being licensed brewers under the Dominion Statute, they had the right of selling beer by and through their employees and draymen without a provincial license, and that the Quebec License Law of 1878 and its amendments were unconstitutional, and if constitutional, did not authorize the complaint and prosecution against R.;

Held, reversing the first holding of the Court below, that the Court of Special Sessions was the proper tribunal to take cognizance of the alleged offence of R. and therefore a writ of prohibition did not lie in the present case; TASCHEREAU and GWYNNE, JJ., dissenting.

2. Affirming the judgment of the Court below, that the Quebec License Act of 1878, 41 V. c. 3. (P.Q.) is constitutional; GWYNNE, J., dissenting on the ground that the Quebec License Act, 1878, imposed no tax upon brewers and therefore the prohibition should be ordered to be issued absolutely.

W. H Kerr, Q.C., for the appellants.

Geoffrion, Q.C., for the respondent.

CITY OF QUEBEC v. QUEBEC STREET RAILWAY COMPANY.

Municipal corporation—By-law, construction of—Street railway—Notice—Time.

The Quebec Street Railway Company were authorized under a by-law passed by the corporation of the city of Quebec, and an agreement executed in pursuance thereof, to

construct and operate in certain streets of the city a street railway for a period of forty years, but it was also provided that "at the expiration of twenty years (from the 9th February, 1865) the corporation may, after a notice of six months to the said company, to be given within the twelve months immediately preceding the expiration of the said twenty years, assume the ownership of said railway upon payment etc., etc." On the the 9th January, 1884, the corporation of the city of Quebec gave a notice to the company of their intention to take possession, but afterwards gave a second notice on the 21st November, 1884, whereby the corporation informed the company that the previous notice was annulled and that after the 9th February, 1885, at the expiration of the time and in the manner prescribed by the by-law they would assume possession, and subsequently on the 21st May they tendered $23,806.30 for the property.

In an action brought to declare the tender valid and for a decree declaring the corporation entitled to take possession,

Held, reversing the judgment of the Court below, FOURNIER, J., dissenting, that the company were entitled to a full six months' notice prior to the 9th February, 1885, to be given within the twelve months preceding the 9th February, 1885, and therefore the notice relied on was defective.

Irvine, Q.C., and *Stuart*, for the appellants.

P. Pelletier, Q.C., for the respondents.

KLOCK v. CHAMBERLAIN.

Sale of land by wife to secure debts due by her husband—Simulated deeds—Art. 1301, C. C.

Where the sale of real estate by the wife, duly separated as to property from her husband, to her husband's creditor is shewn to have been intended to operate as a security only for the payment of her husband's debts, such sale will be set aside as a contravention of Art. 1301 C. C. (P.Q.) STRONG, J., dissented on the ground that the trial judge's finding that the deeds of sale in this case were not simulated should be affirmed.

Fleming, Q.C., for the appellant.

Aylen, for the respondents.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[IN BANC, 21ST MAY, 1888.

REGINA v. AMBROSE and WINSLOW.

Canada Temperance Act—Conviction—Jurisdiction of police magistrate—Place where offence committed—Question of fact—Statute not proved to be in force—Certiorari—Want of jurisdiction to be shewn affirmatively—Join conviction—Imprisonment of one defendant for default of the other—R. S C. c. 178, ss. 87, 88.

The defendants were convicted by the police magistrate of the town of Peterborough of selling intoxicating liquor in that town, contrary to the provisions of the Canada Temperance Act. It was contended that only the contract for sale was made in Peterborough, but that the actual sale took place in Port Hope; there was no conflict of evidence; the magistrate held upon the undisputed facts that the sale was in Peterborough. Upon a motion to quash the conviction;

Held, that the question where the sale took place was one of fact, and the magistrate having found, as shewn by the conviction, that the defendants had sold intoxicating liquor in Peterborough, the Court could not review his decision.

Held, also, that the defendants were not entitled to a *certiorari* to remove the conviction on the ground that the Act was not proved to be in force in Peterborough, because on their application for the *certiorari* they did not shew affirmatively that the Act was not in force there. But

Held, that the conviction was bad and must be quashed, because in the award of punishment it was directed that each of the defendants should pay half the fine and costs, and that in default of distress the defendants should be imprisoned, and under such award one of the defendants having paid his

half of the fine and costs might be imprisoned for the other's default; and this defect was not cured by ss. 87 and 88 of the Summary Convictions Act, R. S. C. c. 178.

W. R. Riddell, for the defendants.

Watson, for the magistrate.

Delamere, for the complainant.

[22ND MAY, 1888.

REGINA v. KENNEDY.

Canada Temperance Act—Conviction for sale by agent—Lease to alleged agent—Question of fact whether agent or not—Question of title—Jurisdiction of magistrate—Certiorari.

Motion by the defendants upon the return of a *certiorari* for an order *nisi* to quash a conviction against the second part of the Canada Temperance Act.

The defendant was convicted of selling intoxicating liquor by his agent in his hotel. The affidavit of the defendant filed on the motion for the *certiorari* denied that he had committed the offence of which he was convicted, and shewed that he had by a formal instrument leased the bar-room of his hotel to a person who had assigned the lease to the alleged agent who was proved to have made the sale of liquor of which the defendant was convicted. The affidavit also stated that the lease was *bona fide*, and not part of a scheme or fraudulent device to relieve the defendant from the consequences of illegal acts. The convicting magistrate did not find that it was a fraudulent scheme or device, but held that the lease in question was not transferable, and convicted the defendant.

Kappele, for the motion. The magistrate decided as a matter of law that this was not a transferable lease; he had no jurisdiction to try a question of title.

ARMOUR, C. J.—It was a question of fact for the magistrate whether this was or was not a sale by agent; he had jurisdiction to try that question. If the view contended for were correct, we should have to review every case on a *quasi* appeal. This conviction is right in point of form, and the magistrate had jurisdiction; the right of *certiorari* is taken away by

statute, and we cannot properly grant it except for want of jurisdiction. The magistrate was not trying the question of title, but the question who was *dominus* in the place where the offence was committed. The order *nisi* must be refused.

FALCONBRIDGE and STREET, JJ., concurred.

Order refused.

[28TH MAY, 1888.

REGINA v. ABBOTT.

Canada Temperance Act—R. S. C. c. 106, ss. 2 and 103 b.—Police magistrate for one of an union of counties—Jurisdiction.

Having regard to the provisions of s. 103 b. of the Canada Temperance Act, R. S. C. c. 106, as interpreted by s. 2, an union of counties united for municipal purposes cannot be said to have a police magistrate by reason of one of the counties so united having one; and a conviction by one commissioned as police magistrate for the county of Dundas for an offence against the Act, committed in the county of Dundas, one of the united counties of Stormont, Dundas, and Glengarry, was quashed for want of jurisdiction.

A. H. Marsh, for the defendant.

Delamere, for the complainant.

REGINA v. ROE.

Canada Temperance Act—Police magistrate, jurisdiction of—County and town—R. S. C. c. 106, s. 103 b.—R. S. O. (1887) c. 72, s. 11—Information and summons—Irregularity.

A person commissioned as police magistrate for the county of Huron, his commission not excluding the town of Wingham, and also having a separate commission as police magistrate for the towns of Clinton, Goderich, Wingham, and Seaforth, respectively, all being in the county of Huron, convicted the defendant at Wingham, of an offence against the Canada Temperance Act committed at Wingham, but upon an information taken and summons issued at Clinton.

Held, having regard to the provisions of s. 103 b. of the Canada Temperance Act, R. S. C. c. 106, and of R. S. O. (1887) c. 72, s. 11, that the magistrate had jurisdiction in the town of Wingham under his commission for the county, and had also jurisdiction under that commission to take the information and issue the summons at Clinton; and the fact that he described himself in the information and summons as police magistrate for the town of Wingham did not deprive him of the jurisdiction which he had as police magistrate for the county.

Regina v. *Young*, 13 O. R. 198, overruled.

Quære, whether the defendant could object to the regularity of the information and summons, he having appeared in obedience to the summons and pleaded not guilty.

Aylesworth, for the defendant.

Delamere, for the complainant.

[THE DIVISIONAL COURT, 22ND MAY, 1888.

LOWDEN v. MARTIN.

Promissory note—Proposal to renew in part refused—Effect of acceptance of cheque for balance—Judgment under Rule 80.

At maturity of certain promissory notes made by the defendants and held by the plaintiffs, the defendants sent to the plaintiffs a proposal for a renewal in part, accompanied by a cheque for part of the amount due and two renewal notes for the balance, the total amount including a sum for interest on the renewals. The plaintiffs returned the renewal notes, but retained the cheque, and brought this action upon the original notes, giving credit for the amount of the cheque.

Held, by STREET, J., in Chambers, refusing a motion for judgment under Rule 80, that although there was no obligation on the part of the creditors to assent to the debtors' proposal, yet by receiving the cheque and keeping it they must be taken to have applied it in the manner in which the debtors when tendering it stipulated, and as it included interest in advance upon the renewals, the creditors were

bound to give the debtors the benefit of the time for which the renewals were drawn.

Held, by a Divisional Court on appeal, that on the state of facts presented the plaintiffs were not entitled to the indulgence of a speedy judgment and execution.

Kappele, for the plaintiffs.

F. W. Garvin, for the defendants.

[ARMOUR, C.J., 18TH MAY, 1888.

CLARKSON v. ATTORNEY-GENERAL OF CANADA.

Customs duties—Lien of Crown—Writ of extent—Preference of Crown over subject—R. S. O. (1887) c. 94.

On the 3rd February, 1887, B., a coal merchant, made an assignment to the plaintiff for the benefit of his creditors under 48 V. c. 26, and there passed thereunder to the plaintiff a quantity of coal in B.'s yards. By permission of the Customs Department, B. had sold before the assignment certain other coal imported by him, without first paying the duty upon it.

Held, 1. That there was nothing in the Customs Act, R. S. C. c. 32, nor in law, giving the Crown the right of lien upon the coal assigned to the plaintiff, for duty payable by B. in respect of the other coal sold by him.

2. That the issue of a writ of extent by the Crown against B. on the 19th February, 1887, for the recovery of the duty so payable in respect of such other coal, would have availed the Crown nothing, so far as the property assigned to the plaintiff was concerned, for it could not have been seized under such extent, having previously become vested in the plaintiff.

3. That the claim of the Crown for the duty payable by B. in respect of such other coal was not payable by the plaintiff out of the proceeds of the property assigned to him in preference to the claims of other creditors; the principle that when the right of the Crown and the subject come into competition that of the Crown is to be preferred, has been applied in winding-up proceedings instituted under statutes

which did not bind the Crown, and where the Crown debtor was not divested of his property by the proceedings; but the principle is not applicable to claims upon estates in bankruptcy, or estates assigned in trust for creditors; in any case the principle has now no existence in Ontario, because the effect of R. S. O. (1887) c. 94, is to do away with any distinction between debts due from the subject to the Crown and debts due from the subject to the subject, and to place them all upon the same footing.

Lash, Q.C., and *R. S. Cassels*, for the plaintiff.

Robinson, Q.C., and *Wickham*, for the defendant.

CHANCERY DIVISION.

[BOYD, C., 9TH APRIL, 1888.

VILLAGE OF WESTON v. CONRON.

Principal and surety—Surety for treasurer of municipality—Treasurer being allowed to receive taxes instead of a collector being appointed—Liability for.

The defendant C. was appointed treasurer of the plaintiffs in 1882 and continued in office till 1887. He was also the clerk of the municipality, and as such in 1885 received certain taxes from the ratepayers for two months of that year.

In an action against C. and N., who was surety for C., in which it was sought to charge both defendants with all moneys come to C.'s hands and not accounted for,

Held, on appeal from a referee's report, that that temporary function was not of such a nature as to terminate C.'s duties as treasurer by necessary implication, and that when the money came to his hands with which he charged himself as treasurer the responsibility of the surety began, and that he should not be charged with any sums which did not appear in his books as treasurer, and which were referable to taxes otherwise received by him.

Foy, Q.C., and *Nason*, for the appeal.

J. K. Kerr, Q.C., contra.

[26TH APRIL, 1888.

BANKS v. ROBINSON

Sale of goods—Agreement to sell—Property not to pass—Stipulation for taking possession—After-acquired property—Registration—R. S. O. c. 125.

J. R. by an instrument in writing agreed in 1880 to sell his business and stock-in-trade to his sons, and provided that all the existing stock was to remain his property until it was paid for, and all after-acquired property brought in by way of substitution for existing stock was to become his property for the purposes of the security for the purchase money, and that on default he should have the right to re-enter and take possession. Default having been made, he took possession in January, 1888, and began selling off by auction. The sons made an assignment for the benefit of creditors in March, 1888. In an action brought by the assignor and some creditors of the sons to restrain J. R. from selling,

Held, that the legal operation of the instrument of 1880 was to retain the property in the existing stock in the vendor, and to confer upon him an equitable title in the stock to be afterwards acquired, and to give him the right to take possession for default in payment. Default having been made and possession taken, that act clothed him with the legal title in the after-acquired goods, which was not affected by the assignment for creditors subsequently executed.

Held, also, that the instrument did not need to be registered to make it operative against subsequent creditors. The Bills of Sale and Chattel Mortgages Act, R. S. O. c. 125, was not intended to cover the case of agreements creating equitable interests in non-existing and future-acquired property.

The effect of the transaction in this case and the advisability of making provision for giving publicity by registration to such dealings, commented on.

Barker v. *Leeson*, 1 O. R. 114, not followed.

Reeve, Q.C., and *Neville*, for the plaintiffs.

J. Maclennan, Q.C., for the defendant Joseph Robinson.

[27TH APRIL, 1888.

In re OAKWOOD HIGH SCHOOL BOARD AND TOWNSHIP OF MARIPOSA.

High school—Application to municipality for grant—R. S. O. (1887) c. 226, s. 35.

Prior to 1st August, 1887, the Oakwood High School Board made application to the council of the municipality of Mariposa for a grant of $4,000 for school purposes, and asked further the privilege of erecting the new building contemplated on township property. This application was negatived by the municipal council by four to one on 18th July, whereupon the school trustees present at the meeting said they would forego their claim to the benefit sought over and above the $4,000, and would at the next meeting bring forward a by-law for the $4,000 alone. They did so at the next council meeting on 8th August, when a by-law authorizing the grant was voted upon, with the result of three votes against it and two votes for it.

Held, that under R. S. O. (1887) c. 226, s. 35, this was not a refusal of the application, but by the interpretation put on that section was an affirmance and an acceptance of the requisition of the High School Board, and the council could not aftewards pass a by-law repealing it, and refuse to give the money.

Before the passing of the original of the above enactment a municipal council had no option to reject, but were under parliamentary obligation to raise by assessment, the amount required for school purposes, even though the money was to be applied towards the erection of a new building. The present legislation relieves them from this necessity only when there is a two-thirds vote of the members present at the meeting of the council for considering the by-law in that behalf. Such a by-law if not negatived by a two-thirds vote of the council fixes the municipal district with liability to raise the amount required, which cannot be repealed as in the case of an ordinary by-law before it is acted on.

Watson and *J. M. Clark*, for the Oakwood High School Board.

Moss, Q.C., and *D. J. McIntyre*, for the township of Mariposa.

[MACMAHON, J., 25TH APRIL, 1888.

In re CENTRAL BANK OF CANADA AND WELLS AND MACMURCHY.

Company—Winding-up—R. S. C. c. 129—Deposit made in bank the day it closed its doors—Recovery of same—Fraud.

Where a deposit was made in a bank on 15th November, and it was shown that at a directors' meeting held the evening previous the necessity of seeking outside assistance or suspending payment had been considered and a resolution passed to suspend payment if such assistance were refused, and that when the bank closed on that afternoon it did not open again, and notice of suspension of payment was given on the following morning,

Held, that the depositors were entitled to be repaid the amount of their deposit as obtained from them by fraud, and the liquidators were ordered to pay the same, with interest from the date of the deposit.

S. H. Blake, Q.C., for the petitioners.

Foster, Q.C., for the bank liquidators.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1888.

ANDREWS v. BANK OF TORONTO.

Debtor and creditor—Insolvency — Deed of composition and discharge—Covenant not to sue.

On 1st September, 1883, B. & Co. drew on the plaintiff at four months for $783.50, the amount of his indebtedness; the plaintiff accepted the draft and B. & Co. discounted it with the defendants; not being paid at maturity it was protested by the defendants. On the 7th January, 1884, B. & Co. made an assignment for the benefit of their creditors, and on 25th January the plaintiff also became financially embarrassed, and procured his creditors, including the estate of B. & Co., to execute a deed of composition and discharge,

whereby they agreed to accept fifty cents on the dollar on their respective debts, payable thirty days from the date of the deed. One C. D. was surety for the payment within the time limited; the plaintiff and C. D. covenanted to pay the several creditors the fifty cents on or before the 25th February; and the creditors covenanted not to sue for their debts; and if the plaintiff and his surety should observe and perform the covenants and agreements on their part, the creditors were to release and deliver up the bills, notes, etc., held by them; and if any of the sureties should sue for their debts, the deed was to be pleadable in bar. The defendants refused to execute the deed. They proved against the estate of B. & Co., and received a dividend of forty cents, which they applied on the paper discounted for B. & Co., and on which a customer was accommodation guarantor. The defendants afterwards sued or threatened to sue the plaintiff for the amount of the draft, and he, not knowing that they had received the dividend, paid them in full, but on discovering the fact brought this action to recover the amount received by them. The plaintiff had not paid the estate of B. & Co. the fifty cents or any part thereof.

Held, that the covenant not to sue in the deed of composition and discharge was not absolute, but merely conditional on payment being made within the thirty days; and as the plaintiff had not paid B. & Co. within the thirty days, he could not have claimed a release, or set up the covenant as a bar to an action; that the defendants were trustees for B. & Co. to the extent of forty cents on the dollar of the amount received from the plaintiff; and B. & Co. could compel the defendants to refund such amount to them, but the plaintiff had no right of action against them.

Lash, Q.C., for the plaintiff.

Robinson, Q.C., and *T. P. Galt*, for the defendants.

DUNCAN v. ROGERS.

Easement—Appurtenant to land conveyed—Way—User—Prescriptive right—Revocable license—Agreement, construction of by Court.

Some years prior to 1847 the plaintiff's father became the owner of lot 18 in the 5th concession of York, and built on

the north-east quarter, and near the 6th concession line, the house in which he lived up to the time of his death. In 1847 J. D. purchased lot 19, adjoining lot 18 on the north. The occupiers of the eastern portion of 19 prior to this, and J. D.'s tenants subsequently, used a trail or road running from the northerly part of the east half of 19 across the west half to the boundary of 18 and 19, where there were several trails or roads across the west half of 18 to a private lane leading in a westerly direction past J. D.'s house to the 6th concession. The trails ran through bush land, and no one thereof was solely or exclusively used, but as was convenient. In 1860 J. D. conveyed the east half of 19 to the plaintiff, and the plaintiff also acquired by devise from his father, who died in 1877, the north-east quarter of 18, which adjoined the east half of 19 on the south. The west half of 19, J. D. devised to his daughter, who had ever since been in occupation thereof, and the north-west quarter of 18 to his son W. D., who was living with him at his death, and who conveyed the same to the defendant. Shortly after J. D. conveyed the east half of 19 to the plaintiff, the latter, with J. D.'s permission, cut a new roadway on the southerly side of the woods on lot 18, connecting thereby with the lane to the 6th concession. In 1877, by an agreement entered into between the plaintiff and W. D., in consideration of certain privileges granted to W. D., he covenanted to permit the plaintiff to have a right of way along the said lane from the 6th concession, and extending forty rods east of the centre of the lot, so as to allow the plaintiff free communication from lot 19 along the lane to the 6th concession.

Held, that there was no defined right of way in 1860 over the west half of 18 appurtenant to the east half of 19, so as to enable the plaintiff to claim an easement therein as granted under the usual words in that behalf in the conveyance of 1860; that the user of the roadway cut in 1860, being merely a license, was revocable at any time, and was revoked by the father's death; and thereafter the user, as the evidence shewed, was merely permissive, and was acceded to by the plaintiff entering into the agreement of 1877.

Per MACMAHON, J.—The jury are to find upon questions of fact, and the Court must apply the law on the facts as found. The construction of the agreement was for the Court,

and its meaning was that the old lane was to be extended easterly in a straight line for forty rods.

Fullerton, for the plaintiff.

Tilt, Q.C., for the defendant.

[26TH MAY, 1888.

In re McLEOD v. EMIGH.

Costs—Motion for prohibition.

By R. S. O. (1877) c. 52, s. 2, a successful party on an application for a writ of prohibition is entitled to costs, and should be awarded costs unless the Court in the proper exercise of a wise discretion can see good cause for depriving such party of costs; and such party should not be deprived of costs unless there appear impropriety of conduct which induced the litigation, or impropriety in the conduct of the litigation.

Under the circumstances of this case, reported 12 P. R. 450; and *ante*, p. 140; the defendant was allowed costs of a successful motion for prohibition to a Division Court.

Aylesworth, for the motion.

A. M. Grier, contra.

IN CHAMBERS.

[BOYD, C., 9TH MAY, 1888.

In re CROSKERY.

Dower—Bar in mortgage—Equity of redemption—Surplus after sale.

The owner of land in fee, mortgaged it to a Building Society in fee. After this he assigned his equity of redemption to the Sheriff of the county of Huron, together with all his estate, for the benefit of his creditors. After the assignment the mortgagees sold under the power of sale, and after payment of their claim a surplus of $387.48 was left, which they sought to pay into court under the Trustees' Relief Act.

Held, on appeal from the Master in Chambers, that the claim of the wife of the mortgagor in respect to dower was of such a character that the mortgagees ought not to be put to the risk of determining whether it was or was not well founded, and were therefore entitled to pay the money into Court.

Smart v. *Sorrenson*, 9 O. R. 640, and *Calvert* v. *Black*, 9 P. R. 255, commented on.

W. M. Douglas, for the mortgagees.

Hoyles, for the assignee for the benefit of creditors.

[ROSE, J., 22ND MAY, 1888.

BANK OF LONDON v. GUARANTEE COMPANY OF NORTH AMERICA.

Payment into Court—Withdrawal of part of claim—Dismissing action—Costs—Rules 179, 218.

The plaintiffs claimed in this action $3,249.36, "amount of defalcation of J.," and $90.55 for certain expenses connected therewith, in all $3,339.91. The defendants paid into Court $3,273, claiming by their notice of payment in that it was sufficient to satisfy the plaintiffs' claim. There was no specific application of the money paid in to any part of the claim. The plaintiffs did not deliver a statement of claim, and upon notice of a motion under Rule 203 to dismiss the action being served by the defendants, the plaintiffs gave a notice under Rule 170 of withdrawal of the balance of their claim.

Held, that the plaintiffs had no power under Rule 170 to withdraw; the portion of Rule 170 relating to the withdrawal of part of the alleged cause of complaint is applicable only where the part sought to be withdrawn can be severed from the rest of the claim; and an order dismissing the action was proper.

Semble, that the plaintiffs, not having under Rule 218 accepted the money in full satisfaction of their claim, were liable to pay the whole costs of the action; but the disposition of costs by the local Judge who made the order was not interfered with on appeal.

Aylesworth, for the plaintiffs.

H. J. Scott, Q.C., for the defendants.

[STREET, J., 28TH MAY, 1888.

VILLENEUVE v. WAIT.

Writ of summons—Special indorsement—Judgment under Rule 80.

The writ of summons was indorsed as follows: "The plaintiff's claim is for $213.90, balance due for sawing wood by the plaintiff for the defendant."

Held, not a sufficient special indorsement to admit of the plaintiff moving for judgment under Rule 80.

H. Symons, for the plaintiff.

Aylesworth, for the defendant.

MASTER'S OFFICE.

[THE MASTER-IN-ORDINARY, 30TH APRIL, 1888.

In re CENTRAL BANK OF CANADA.

Ex parte HARRISON and STANDING.

Company—Winding-up—Set-off—Contributories—Depositors.

The liability of a contributory for the debts of a company commences at the date when he entered into the contract which made him a member or shareholder of the company.

The English decisions upon the subject of set-off in winding-up proceedings are not applicable or binding upon the Courts here, because the Canadian Winding-up Act, R. S. C. c. 129, has two sections, 57 and 73, which are not in its English original; and under these sections read in connection with ss. 44 and 46, the contributories of an insolvent bank are entitled to set off their deposits in the bank at the time of its suspension against the amount of their double liability under the Bank Act.

Exchange Bank v. *Burland*, 8 Legal News 18, (Quebec) not followed.

Remarks upon the authority of decisions of Courts in another Province, whose jurisdiction is derived from the same Dominion statute.

Foster, Q. C., for the bank liquidators.

J. M. Clark, for the contributories.

First Division Court of the County of Brant.

[9TH MAY, 1888.

WATTS v. BEEMER: GRACE and the COUNTY of BRANT, GARNISHEES.

Attachment of debts—Fine imposed under summary conviction, afterwards quashed—Money in hands of municipality—Service on treasurer—Solicitor's lien.

WILKES, DEPUTY JUDGE.—I think the plaintiffs are entitled to judgment against the primary debtor for $44.35 and costs. As to the garnishees I do not find that the garnishee James Grace is indebted to the primary debtor. Mr. Grace is police magistrate for the county of Brant, exclusive of the city of Brantford. It is sought herein to garnish in his hands a fine paid to him as such police magistrate, and paid over by him to the county of Brant, the conviction under which the fine was imposed having been quashed. Under the circumstances disclosed I do not see how any debt is shown to exist between Mr. Grace and the primary debtor. It is otherwise as far as the county of Brant is concerned. The conviction having been quashed, the fine in the hands of the county is certainly money in their hands belonging to the primary debtor. The question was raised by Mr. Mackenzie as to the jurisdiction of the court and as to service of the summons on the garnishee. I think the service upon the treasurer of the county is good service upon the county of the garnishee summons, as the practice of the Division Court follows the High Court practice, and service upon a treasurer is sufficient: see Rule 167, Cons. Rules of Practice. The only question I have had some doubt upon is the one as to whether Mr. Mackenzie has a lien upon the fund recovered by the quashing of the conviction. My first impression was that he had no lien; but upon looking at the cases of *Yemen* v. *Johnston*, 11 P. R. 231; *Re Ryan*, 11 P. R. 227; *Watt* v. *Griffith*, 5 O. R. 478, I am of opinion that the fine in this case, which constitutes the fund over which the legal contest took place, resulting in the quashing of the conviction imposing it, was virtually recovered by the exertions of Mr. Mackenzie, the primary debtor's solicitor, and that this fine is subject to his lien as such solicitor.

(Reported by J. B. Mackenzie, Esq., Brantford.)

NEW BRUNSWICK.

In the Supreme Court.

In re PHILIP

Solicitor and client—Duty of attorney to fully acquaint client with contents of a deed he asks the client to execute—Right of client to bill of costs—Summary remedy against attorney to compel payment of money belonging to client—Bill of costs—Counsel fees.

It is reprehensible in an attorney to obtain a power of attorney from his client, without giving him an opportunity of fully acquainting himself with its contents.

Before a client is to be called upon to pay his attorney's bill, he is entitled to a copy of it specifying the items. It is not sufficient to state the amount in gross.

Where a client authorized his attorney, who had money belonging to the client in his hands, to employ another attorney in connection with the business, the principal attorney was not justified in paying the charge without submitting the bill to his client; and where that had not been done, and the items of the charge were not shewn, it was disallowed on an application against the principal attorney for an account of the money in his hands.

An attorney is not justified in acting professionally for several parties, where their interests clash.

Where counsel fees charged in an attorney's bill appeared to be extravagant, the Court disallowed them.

PECK v. ALBERT RAILWAY COMPANY.

Solicitor—Railway company—Agreement by managing director—Ratification of by directors—Whether a fixed salary is treated as counsel fees or attorney's bill—Effect of receipt in full settlement of all claims.

A railway company may be bound by the act of its managing director in employing a solicitor at a stated yearly salary.

Acceptance of the services of the solicitor by the directors, is evidence of a ratification of the original hiring, even though the managing director acted without authority.

Where by the agreement the salary was to be over and above all fees and disbursements as counsel or attorney, it may be recovered; and it is not necessary to deliver a bill as for attorney's fees, before bringing an action.

A receipt of a sum of money expressed to be "in full settlement of all claims, dues, debts, and demands" up to the date, is not conclusive, and may be explained, and shewn not to relate to a claim then in suit on a special agreement, but to a separate and distinct claim.

HALIFAX BANKING CO. v. SMITH.

Special bail—Affidavit to hold to bail—Where a nullity—Effect of delay in applying to enter an exoneretur.

The defendant was arrested on the 2nd November, 1885, special bail entered on 30th November, and notice of appearance served. On the 16th December a declaration was filed, and a copy served on the defendant's attorney. In the following Easter Term the defendant applied to enter an *exoneretur* on the bail-piece on the ground that the affidavit to hold to bail was a nullity—not having been sworn before a commissioner.

Held, by WETMORE, FRASER, and TUCK, JJ., (PALMER, J. dissenting), that the delay in applying was no ground for refusing the application.

Per PALMER, J., that, although the affidavit was bad, the recognizance of bail could not be treated as a nullity, and that the defendant had waived the objection by his delay.

In re FREEZE.

Fisheries Act, 31 V. c. 60—Offence under s. 14, s-s. 2—Conviction—Form of.

In a conviction for an offence under s-s. 2 of s. 14 of the Fisheries Act, 31 V. c. 60, the form of conviction given by the Summary Convictions Act, awarding distress for non-payment

of the fine, and in default thereof imprisonment, must be adopted; and not the form given in the schedule to the Fisheries Act—the latter being intended to apply to other offences thereunder.

PRITCHARD v. MERCHANTS MARINE INSURANCE CO.

Insurance—Marine—Policy—Condition against alienation—Mortgage—Absolute bill of sale intended as a mortgage—Whether breach of condition.

A. and B. each owning 32-64ths of a vessel, A. insured his "on account of whom it may concern," the insurance being effected on behalf of himself and B. The policy contained the following condition: "The interest of the assured in this policy or any part thereof, or in the property hereby insured, or any part thereof, is not assignable without the consent of the company in writing, and in case of transfer or termination of any such interest of the insured, either by sale or otherwise, without such consent, this policy shall from thenceforth be void and of no effect." B. afterwards, without the company's consent, transferred 8-64ths to A. by a bill of sale, which, though absolute on its face, was in reality given as security for advances made by A. in fitting out the vessel.

Held, that the condition referred to an absolute assignment, and did not prohibit a transfer by way of mortgage.

WOOD v. PITTFIELD.

Master and servant—Injury to servant in consequence of defective materials—Liability of master—Contributory negligence.

Where a master has such a personal supervision of work on which a servant is engaged as that he knows, or ought to know, of the condition of the materials employed in the work, he is liable for injuries resulting to the servant from the materials being defective, even though he has employed a competent foreman, unless the servant, by the exercise of reasonable and ordinary care, could have seen the defect.

HAGGERT MANUFACTURING COMPANY v. PUGSLEY.

Sale of goods by manufacturer—False representation as to quality—Bill in equity to recover the purchase money—Fraud—Jurisdiction.

If a plaintiff is induced by false representations of the defendant respecting the quality and fitness of an article manufactured by him, and intended for a particular purpose, to enter into a contract of purchase, and pays a portion of the purchase money, a bill in equity lies to obtain re-payment of the money, on the article turning out defective, though the plaintiff would have a remedy at law for breach of the warranty.

MANITOBA.

IN THE QUEEN'S BENCH.

[FULL COURT.

ONTARIO BANK v. HAGGART.

Attachment of debts—Garnishee—Payment into Court—Suggestion of third party—Claimant.

Garnishees paid the money attached into Court, making no suggestion of the existence of any other claimant than the plaintiffs. Upon the plaintiffs' motion for payment out, two of the defendants contended that the garnishees were not indebted to the defendants at all, but to another firm of which the defendants and another were members, and of which one M. was assignee. An order was thereupon made for the trial of an issue between the plaintiffs and the assignee as to whether the garnishee was indebted to the defendants.

The plaintiffs appealed.

Held, that inasmuch as the garnishees had not made any suggestion of another claimant the order should have directed payment to the plaintiffs, and the assignee been left to his action against the garnishees.

Robarts v. *Death*, 8 Q. B. D. 319, distinguished.

ATTORNEY-GENERAL v. FONSECA.

Crown patent—Setting aside in part—Purchaser for value—Laches—Estoppel by former suit—Cross-relief—Improvidence without fraud—Presumption.

This was an information to set aside a patent issued to the defendant Fonseca in so far as it related to a portion of the property included in it. The defendant Schultz had purchased one-half interest in the land from Fonseca.

The following are the principal points of law established by the decision:—

1. A patent may be good in part and bad in part; and may be set aside so far as it relates to certain of the property included in it.

2. The plea of purchaser from the patentee for value without notice, is of no avail as against the Crown.

3. The plea of laches is no defence as against the Crown. The *Nullum Tempus* Act, 9 Geo. 3, c. 16, is not in force in this Province.

4. In a former suit, in which the same portion of the patent was attacked upon the same ground, the relator in this information was plaintiff and the Attorney-General was defendant. The bill in that case was dismissed, but such dismissal was held to be no estoppel as against the Attorney-General in this information. The Attorney-General in the former case could not, under Gen. Ord., have prayed cross-relief against his co-defendants. In any case it was not obligatory upon him to do so.

5. A patent may be set aside upon the ground of improvidence, although no fraud is charged against the patentees.

6. The presumption against error in a Crown patent is not so strong as in an ordinary deed between subject and subject.

7. In order that a patent may be set aside, it is not necessary to shew that some person is entitled to the land. It is sufficient that there existed claims or material facts which, if present to the mind of the Crown, would have influenced it in dealing with the land.

8. It is not an answer to a charge of improvidence and mistake, that the Crown had in its posession documents which disclosed the claims or material facts, if these are shewn not to have been present to the mind of the officials when granting the patent.

[TAYLOR, C. J.

HOLMES v. THE CANADIAN PACIFIC R.W. CO.

Evidence—Order for examination of witness about to leave jurisdiction—Ex parte

This was an application to set aside an order made *ex parte*, for the examination of B. as a witness on behalf of the plaintiff. The affidavit upon which it was granted stated the cause of action; that appearance had been entered but no declaration filed; that B. was a material and necessary witness; that he intended to leave the Province on the day on which the order was made, and would not return for at least six months.

Held, that according to the established practice the order should not have been made *ex parte*; and it was set aside accordingly.

O'CONNOR v. BROWN.

Costs—Taxation—Appeal—Counsel fees.

Under the present circumstances of the Province the Court will exercise a control over the *quantum* of counsel fees taxed by the Master.

HOOPER v. BUSHELL.

Costs—Old affidavits used on new motion.

Upon an interlocutory application the defendant refiled material used by him upon a previous application which he had made and which had been refused without costs. An order was granted upon the new application with costs. Upon taxation the Master allowed the costs of preparing the old material; but upon appeal,

Held, that such costs were improperly allowed.

DOUGLAS v. BURNHAM.

Interpleader issue an action—Trial of on Tuesday.

An interpleader issue is within the term *action*, and may be entered for trial upon a Tuesday.

Plaxton v. *Monkman*, 1 Man. L. R. 371, considered.

RAJOTTE v. CANADIAN PACIFIC R. W. CO.

Jury notice, withdrawal of replication in order to add—Prejudice of jury against defendant.

Where by inadvertence replication is filed without a jury notice, leave may be given to withdraw it in order to refile it with a notice for jury. And the fact that the defendants allege that owing to excited feeling a fair trial cannot be had before a jury, will not be an answer to the application.

[DUBUC, J.

McLELLAN v. MUNICIPALITY OF ASSINIBOIA.

Tax sale—Non-execution of deed.

This was a demurrer to the plaintiff's declaration. It alleged that the plaintiff was the assignee of a purchaser at a tax sale of lands in the defendant municipality; that the time for redemption had expired; and that the proper officials in that behalf of the municipality refused to execute a conveyance to the plaintiff.

A demurrer to the declaration was allowed, because by the statute, 47 V. c. 60, the reeve and treasurer were directed to execute such deeds, and no duty was cast upon the municipality for their negligence or refusal.

[KILLAM, J.

DAVIDSON v. CAMPBELL.

Mechanic's lien—Amendment of bill after time for filing bill has elapsed—48 V. c. 33, s. 13—Filing contracts.

The bill alleged a contract with the defendant C. for the performance of certain work in the erection of a building upon land of C. By amendment, made after the time for filing the bill had elapsed, the plaintiffs alleged that their contract was with the defendants K. & McD., who had contracted with C. for the erection of the whole building, thus changing their position from contractors to sub-contractors. No new *lis pendens* was filed.

Held, that the plaintiff could not rely upon the original bill and *lis pendens*.

It is no defence to an action for work done under a verbal contract that the contract, or a statement of it, was not filed in accordance with the statute 48 V. c. 33, s. 13.

MONKMAN v. BABINGTON.

Injunction—Threatened trespass.

The plaintiff claimed to be tenant of the defendant Babington of certain lands upon which he (plaintiff) had sowed a crop of wheat. The defendants threatened to reap the crop, whereupon the plaintiff filed a bill for an injunction. During the suit the defendant did harvest a portion of the crop, but did not otherwise interfere with the plaintiff's occupation. The plaintiff's right was not very clearly established by the evidence.

The injunction was refused, but without costs.

BERKER v. McDONALD.

Infant—Guardian—County Court.

Although an infant may sue in the County Court and have a transcript of the judgment filed in the Queen's Bench, without a guardian being appointed; yet he cannot obtain an order to examine the defendant as a judgment debtor in the Queen's Bench without a guardian.

In re QU'APPELLE VALLEY FARMING CO., LIMITED.

Company—Winding-up—Notice of application—Insolvency.

Notice of an application for a winding-up order need not be served upon creditors, contributories, or shareholders of the company. They should be served with notice of the application to appoint a liquidator.

Service by a creditor of a demand for payment in order to establish insolvency upon directors of the company is not sufficient.

A company does not "acknowledge" insolvency by allowing judgment against it to remain unpaid.

Insolvency held to have arisen from the inability of the company to meet its liabilities in full and a conveyance of the main part of its asssets to another company without the consent of the creditors and without satisfying their claims.

In re NEVINS, A LUNATIC.

Jurisdiction in lunacy—Court's administration of estate—Liability for failure of banker—Committee's disposition of money—Interest—Compensation—Support of lunatic's wife.

The death of the lunatic determines the jurisdiction in lunacy, except for certain purposes, as accounting, delivery of property, etc.

The paramount consideration in dealing with a lunatic's estate is his comfort and benefit, and the Court exercises great freedom in dealing with the estate.

Expenditures which have been made on behalf of a lunatic without authority may be allowed by the Court, but not by the Master. Such expenditures will be less readily sanctioned after the death of the lunatic.

Where a committee deposits money with a banker, the mere fact of his suspension is sufficient ground for presumption of negligence. The fact that the banker is a private banker will not of itself render the committee liable as being negligent.

It is the duty of the committee to pay into Court moneys which will not within a short time be required for the purposes of the estate.

A committee is liable for interest upon money received by him from its receipt until payment.

The Court has power to allow compensation to a committee, but the Master has no such power unless the matter is specially referred to him.

The wife of a lunatic has authority to pledge her husband's credit for necessaries for her support.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

PROUDFOOT, J.] [6TH MARCH, 1888.

ARCHER v. SEVERN.

Will—Specific bequest of mortgage to mortgagor—Right of executors to insist on payment of other claims against mortgagor—Statute of Limitations.

J. S. directed his executors to cancel and entirely release the indebtedness of his son W. S. upon a mortgage made by him to the testator, such release to operate and take effect immediately on and from the testator's death. W. S. was also indebted to the testator on a promissory note and for goods, which together with interest amounted to upwards of $3,740. This amount the executors claimed they were entitled to demand payment of before they could be called upon to discharge the mortgage, which contention was sustained by the Master in an action for the administration of the estate; but on motion his finding was reversed by PROUDFOOT, J., 12 O. R. 615.

On appeal to this Court the judgment of the Court below was affirmed with costs, BURTON, J.A., dissenting.

Per BURTON, J.A.—The bequest of the mortgage was not a specific bequest; and without reference to what the original purpose of filing the bill was, W. S. had claimed to have his mortgage released and had obtained an order for its unconditional discharge, so that he stood in the same position as if he had brought an action for that purpose expressly, and had thus brought himself within the rule that he who seeks equity must do equity; whereas the effect of the judgment appealed from by reason of the operation of the Statute of Limitations was to leave the legatee free from the debt due by him to the estate, and to expose the executors to a liability to make good that loss.

S. H. Blake, Q.C., and *W. Cassels*, Q.C., for the appellants, the executors of John Severn.

Moss, Q.C., and *W. Barwick*, for Elizabeth Pannell, and *Snelling*, for Mary Davison, beneficiaries under the will of John Severn.

W. H. P. Clement and *Sherry*, for William Severn.

C. C. GREY]

[29TH MAY, 1888.

NORTON v. McCABE.

County Courts—Term motion—Time for making—R. S. O. (1887) c. 47, ss. 29 41—Rule 488.

Reading s. 41 with s. 29 of the County Courts Act, R. S. O. (1887) c. 47, and having regard to the provisions of Rule 488, it cannot be held that a party is restrained by s. 41 to move in term time, *i.e.*, during the first two days of the next quarterly sittings of the County Court, against the verdict or judgment at the trial; s. 41 limits a time after which a party has no right to move; but he may by force of s. 29 move before the Judge in Court, if the Judge chooses to hear him, at any time after judgment has been given, and not necessarily at one of the usual fixed sittings of the Court.

Smith v. *Rooney*, 12 U. C. R. 661, is not applicable to the existing law and practice.

C. J. Holman, for the plaintiff.

George Bell, for the defendant.

[BOYD, C., AND OSLER, J.A., 12TH DECEMBER, 1887.

In re EAST NORTHUMBERLAND PROVINCIAL ELECTION PETITION.

RICHMOND v. WILLOUGHBY.

Elections—Agency—Bribery—Illegal practices—Scheme for violating secrecy of ballot—Elections Act, R. S. O. (1877) c. 10, ss. 146, 159.

The respondent was nominated by a convention of the Conservative party, composed of fifty or seventy-five persons, among whom was R., who was well known as a promi-

nent member of the party, and was on intimate terms with the respondent, both of them being physicians. R. was one of the persons nominated at the convention, but the choice fell on the respondent, who then made a speech of acceptance in which he said he expected his friends to take an interest in the election and to work for him. R. made no systematic canvass, but he asked several people for their votes, was at various informal meetings of voters held in the interest of the respondent, and with the respondent visited the houses of several voters.

Held, that R. was an agent of the respondent.

F. D. was also at the convention which nominated the respondent, and he and W. D. were among the supporters of the respondent in a particular locality who held meetings at which the voters' lists were discussed and arrangements were made for looking up doubtful voters.

Held, *per* BOYD, C., that these men were both to be regarded as agents of the respondent.

R. committed two clearly proved acts of bribery; F. D. and W. D. entered into a scheme for violating the secrecy of the election by inducing voters to exhibit their ballots, after they were marked, at a window; and the evidence developed at least two other acts of bribery, though not by agents, and more suspicious circumstances; but all these were without the knowledge or consent of the respondent. The vote polled was about 4,500, out of which there was a majority of 51 for the respondent.

Held, that the election was void because of the corrupt acts of R.; and in view of the conduct and details of the contest, the saving provisions of s. 159 of the Election Act, R. S. O. (1877) c. 10, could not be applied.

Per BOYD, C.—The scheme for violating the secrecy of the ballot was an illegal act under s. 146, and had no little significance when taken in connection with the proved acts of bribery. In estimating the application of s. 159 it was impossible to leave out of sight the illegal practices under s. 146.

Lash, Q.C., and *W. R. Riddell*, for the petitioner.

McCarthy, Q.C., and *Ketchum*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 30th May, 1888.

REGINA v. BACHELOR.

Canada Temperance Act—Conviction—Information laid after defendant has left jurisdiction of magistrate—R. S. C. c. 178, s. 13, construction of.

The words "being within the jurisdiction of such justice" in sec. 13 of the Summary Convictions Act, R. S. C. c. 178, are to be read as referring to the time when the offence or act was committed, and not to the time when the information was laid; and an order *nisi* to quash a conviction for an offence against the second part of the Canada Temperance Act on the ground that the defendant, not being within the territorial jurisdiction of the convicting magistrate at the time the information was laid, having left such jurisdiction after the offence was committed, the magistrate had no jurisdiction to take such information, nor to summon the defendant from without his jurisdiction, was discharged with costs.

Mackenzie, Q.C., for the defendant.

Delamere, for the complainant.

[4th June, 1888.

REGINA v. SELBY.

Criminal law—Forgery—Corroboration—Interest of witnesses—R. S. C. c. 174, s. 218.

The defendant was convicted of uttering, with knowledge that it was a forgery, the indorsement of the name "Taylor Brothers" upon a promissory note, which had been discounted by a bank, but given up and destroyed before maturity upon security being furnished to the bank. The manager of the bank and the business partner of the defendant gave evidence of the forgery, and the three members of the firm of Taylor Brothers were also called as witnesses and denied having indorsed the note, or having any knowledge of it.

Held, that neither the members of the firm of Taylor Brothers nor the bank manager were persons interested or supposed to be interested in respect of the indorsement, within the meaning of R. S. C. c. 174, s. 218, and their evidence therefore was sufficient to corroborate that of the other witness.

Irving, Q.C., for the Crown.

Osler, Q.C., for the defendant.

[6TH JUNE, 1888.

REGINA v. BUDWAY.

Lord's Day Act, R. S. O. (1887) c. 203—Driving cab on Sunday—Conviction of servant of livery stable keeper.

Bigelow, for the defendant, moved absolute an order *nisi* to quash a conviction by the police magistrate of the city of Toronto for an offence against the Lord's Day Act, R. S. O. (1887) c. 203. The defendant was a cab-driver in the service of Charles Brown, a livery stable keeper in Toronto, and the offence charged was driving a party of strangers through the city on a Sunday.

Bigelow contended that the Lord's Day Act does not apply to servants: citing *Sandeman* v. *Beach*, 4 B. & C. 96.

Badgerow shewed cause and referred to *Rex* v. *Middleton*, 4 Dowl. & R. 824; *Bloxon* v. *Williams*, 3 B. & C. 232.

ARMOUR, C.J.—I think the statute does not apply to this case; a man who is driving for the owner of a vehicle is not within the words of the second section, "merchant, tradesman, artificer, mechanic, workman, labourer, or other person whatsoever."

The conviction must be quashed.

FALCONBRIDGE, J.—The Act certainly does not apply to the servant, even if it does to the owner.

STREET, J., concurred.

Order absolute quashing conviction without costs.

[8TH JUNE, 1888.

REGINA v. GORDON.

Liquor License Act, R. S. O. (1877) c. 181—Summary conviction—Absence of police magistrate for city—Jurisdiction of justices of the peace.

The defendant was convicted by the police magistrate of the city of Toronto for an offence committed at Toronto against the Liquor License Act, R. S. O. (1877) c. 181, s. 39. Section 68 of that Act makes such magistrate the proper tribunal for the trial of such offence; but the information was taken before a single justice of the peace, who was acting for the police magistrate in his absence and at his request, and upon such information the defendant was brought before two justices of the peace and remanded till the day on which he was convicted.

Held, that the information was properly taken by one justice under the provisions of s. 6 of the Summary Convictions Act, which is made applicable both by R. S. O. (1877) c. 181, s. 68, and R. S. O. (1877) c. 74, s. 1; and two justices being the tribunal substituted for the police magistrate in the case of absence, by 41 V. c. 4, s. 7, the defendant was legally convicted.

Murdoch, for the defendant.

Badgerow, for the complainant.

[23RD JUNE, 1888.

REGINA *ex rel.* JOHNS v. STEWART.

Municipal elections—R. S. O. (1887) c. 184, ss. 187, 188—Corrupt practices—Procedure—Quo warranto—Summons or information.

All proceedings taken to contest the validity of any election mentioned in s. 187 of the Municipal Act, R. S. O. (1887) c. 184, whether for bribery, corrupt practices, or any other cause, should be commenced by writ of summons in the nature of a *quo warranto*, as provided by s. 188, and not by information in the nature of a *quo warranto*, or otherwise.

Aylesworth, for the relator.

McCarthy, Q.C., for the respondent.

REGINA v. ARNOLD.

Certiorari—Remedy for false return—Costs.

Motion by the complainant to quash the return to a *certiorari* or to compel the convicting magistrate to eliminate from it the award of costs in an order dismissing the complaint, on the ground that it was added after adjudication, and was not part of the adjudication.

Held, that the motion could not be granted in the face of conflicting affidavits as to what took place upon the dismissal of the complaint. In any case, the only remedy for the false return to a *certiorari* is by action on the case at the suit of the aggrieved party, or by criminal information.

As the difficulty was to some extent occasioned by the justice allowing the defendant to draw up his order, and allowing the memorandum as to costs to be added long after the proceedings were at an end, the dismissal of the motion was without costs.

Hewson, for the complainant.

D. Urquhart, for the defendant.

REGINA v. BROWN.

Canada Temperance Act—Disqualifying interest of magistrate—Rejection of evidence to shew interest—Award of costs—Inspector's fee—Interpreter's fee—Evidence of prior conviction—Jurisdiction of magistrate—Certiorari.

Upon a motion to quash a conviction by a police magistrate for a second offence against the Canada Temperance Act:—

1. It was contended that the magistrate had a disqualifying interest in the prosecution, because he had employed and paid agents to secure convictions under the Act, and because he was a strong temperance advocate with an alleged bias in favour of the prosecution in cases under the Act. It was not shewn that the magistrate was interested or engaged in promoting or directing the prosecution of this offence, or defraying the expenses of it, or paying agents for evidence to be given upon it.

Held, that it was not to be inferred from anything alleged to have been done by the magistrate in other prosecutions, that the same was done by him in this; and that the statements were of too loose and vague a character to support a finding that the magistrate was disqualified from sitting.

Regina v. *Klemp*, 10 O. R. 143; *Regina* v. *Farrant*, 20 Q. B. D. 58; 4 Times L. Reps. 43 and 87; and *Regina* v. *Justices of Cumberland*, 4 Times L. Reps. 294, referred to.

2. At the hearing before the magistrate the defendant attempted to shew by witnessess that the magistrate had a disqualifying interest in the case, but the magistrate refused to admit such evidence.

Held, that the evidence was inadmissible, and even if admissible, the rejection of it would not afford ground for quashing the conviction.

Rex v. *Justices of Cambridgeshire*, 1 D. & R. 325; *Rex* v. *Justices of Carnarvon*, 4 B. & Ald. 86; and *Regina* v. *Dunning*, 14 O. R. 52, referred to.

3. It was also contended that the magistrate exceeded his jurisdiction by ordering the defendant to pay $3 as inspector's fees, $2 for an interpreter, and $1 justice's costs.

Held, that the fees to be paid to witnesses in prosecutions such as this are not established by any law, and such are to be allowed, under s. 58 of the Summary Convictions Act, as to the justice seems reasonable; and an interpreter may properly be treated as a witness.

In any case, however, the award of costs was within the jurisdiction of the magistrate, and *certiorari* would not therefore lie, (being taken away by the statute under which the conviction was made) on the ground of want of jurisdiction; and the erroneous allowance of certain items of costs would not warrant the quashing of the conviction.

4. The information specifically charged that the defendant had been previously convicted under the Act, and the affidavit filed by the defendant did not deny the fact, but only the evidence of it.

Held, that the question whether the defendant had been previously convicted or not was a matter within the jurisdiction of the magistrate, and his finding as to it was conclusive.

Brittain v. *Kinnaird*, 1 B. and B. 432; *Regina* v. *Mullen*, 4 O. R. 127, referred to.

Held, also, that the provisions of s. 115 of the Canada Temperance Act are directory only.

Aylesworth and *Hewson*, for the defendant.

Delamere, for the complainant.

REGINA v. CATON.

Transient traders—42 V. c. 31, s. 22—Municipal by-law—Conviction.

The by-law under which the defendant was convicted provided that "no transient trader or other person occupying a place of business in the town of M. for a temporary period less than one year, and whose name has not been duly entered on the assessment roll for the current year, shall * * offer goods, wares, and merchandize for sale * * within the limits of the town of M., without or until he shall have first duly obtained a license for that purpose." The conviction was for that the defendant, being a transient trader, occupying a place of business in the town of M., did sell certain goods, wares, and merchandize, contrary to the by-law.

Held, that the by-law was sufficiently within the powers given by 42 V. c. 31, s. 22, to warrant the conviction, and that the words in the by-law "less than one year" were but a limitation of the words "temporary periods" used in the statute, and did not vitiate the by-law; but

Held, that the want of an allegation in the conviction that the defendant was a transient trader whose name had not been duly entered on the assessment roll for the current year, was fatal.

J. B. Clarke, for the defendant.

Aylesworth, for the complainant.

[THE DIVISIONAL COURT, 23RD MAY, 1888.

BRADY v. SADLER.

Crown patent—Construction of—Reservation of drowned lands—Use of bracket boards on mill-dam—Prescription—Evidence.

A Crown patent, issued in 1852, conveyed to the plaintiff M. B. a tract of land "containing by admeasurement sixty

acres, be the same more or less," and otherwise known as lot 9 in the 4th concession of the township of Ops, "exclusive of the lands covered by the waters of the S. river, which are hereby reserved, together with free access to the shore thereof for all vessels, boats, and persons." The lot actually contained 200 acres, but the dry part was only 60 acres. At and before the issue of the patent there was a mill-dam on the river S., which raised the waters of the river and flooded a portion of lot 9; the plaintiffs did not object to the flooding of lot 9 by the dam, but brought this action to restrain the defendants from still further flooding the lot to the extent of about four acres, by the use of bracket boards upon the dam.

The two Judges composing the Divisional Court agreed in reversing the judgment of PROUDFOOT, J., 13 O. R. 692, and in holding that the defendants had no prescriptive right to overflow the plaintiffs' lands by means of the bracket boards, but disagreed as to the construction of the patent; as to which it was

Held, per ARMOUR, C.J., that the words in the grant "containing by admeasurement sixty acres, be the same more or less" did not control or affect the description of the land granted, that description being plain and unambiguous; that the words "exclusive of the lands covered by the waters of the S. river, which are hereby reserved" meant the waters of the river S. in its natural channel, the waters between its shores in its natural condition; and therefore that B. took under the patent not only the dry part of lot 9 but also the drowned land excluding the channel of the river; and the plaintiffs had established their title to the land upon which the water was penned back by the use of bracket boards upon the dam.

Per STREET, J.—The language of the description in the patent admits of two different constructions, and that should prevail which would make the quantity of land conveyed agree with the quantity mentioned in the patent; and therefore the patent should be construed as if it excluded all the drowned land both within and without the actual channel of the river; the extent of the drowned land being measured by reference to the height of the water as maintained by the dam without the bracket boards.

Remarks upon the admission of extrinsic evidence to aid in the construction of a Crown patent.

Moss, Q.C., and *Hugh O'Leary*, for the plaintiffs.

S. H. Blake, Q.C., and *T. Stewart*, for the defendants.

[25th MAY, 1888.

BANK OF HAMILTON v. TAMBLYN.

Chattel mortgage—Informality cured by taking possession—Insolvency of mortgagor—Prior seizure by mortgagees under execution—Preference—48 V. c. 26, s. 2.

A chattel mortgage made by D. to McL. was given to secure a sum made up of debts due to McL. and two other persons; McL. made the usual affidavit of *bona fides*, asserting that the whole sum was due to him; no trust of any kind appeared upon the mortgage, though the intention was that McL. should hold it as trustee for the other two. The mortgage was filed within the proper time after its execution. McL. assigned the mortgage to the plaintiffs, who afterwards obtained judgment against D., and under their execution the sheriff seized the property covered by the mortgage. After this seizure the plaintiffs instructed the sheriff to withdraw, and then took and held possession of the property under the mortgage. The defendants placed writs of execution against the goods of D. in the hands of the sheriff after the plaintiffs had taken possession under their mortgage. D. was solvent when he gave the chattel mortgage, but insolvent when the plaintiffs took possession.

Held, that the fact that no trust was declared on the face of the mortgage was nothing more than an informality, and was cured by the taking possession before the rights of creditors had attached on the chattels; and neither the insolvency of the mortgagor at the time of taking possession nor the fact of the seizure under execution before taking possession affected the position of the plaintiffs.

Held, also, that the taking possession could not be viewed as a preference within 48 V. c. 26, s. 2.

J. J. Scott, for the plaintiffs.

H. J. Scott, Q.C., for the defendants.

THOMPSON v. ROBINSON AND WILSON.

Solicitor and client—Breach of duty by solicitor—Liability of partner—Scrivener's business.

The defendants, who in 1878 entered into partnership as solicitors, carried on as part of their ordinary business that of investing moneys for clients. Previous to the partnership the defendant R. had been employed by the plaintiff to do that kind of business for her, and during the period of the partnership the whole of the moneys originally entrusted to R. were lost, through a breach of duty on the part of R. in investing the plaintiff's money. From the commencement of the partnership down to March, 1883, after which time the breach of duty occurred, the account of the plaintiff was kept in the books of the firm, charges for services rendered were made against her, though not for the management of her affairs or for services in making investments, and were also made against borrowers from her funds for conveyancing, and the profits went to the account of the partnership.

The evidence shewed that the plaintiff insisted upon dealing with R. as her special adviser and solicitor; that she disliked W. and never consulted him as to her affairs; and that she wished her affairs to be kept as far as possible from the knowledge of anyone but R.

It also appeared from the evidence that R. was to share in the profits arising from the investment which resulted in the loss of the plaintiff's money, and that he did not make any charge for services in connection with it.

Another fact shewn was that R. during part of the period of partnership kept the plaintiff's accounts in a book which he called his private ledger.

Held, that in making the investment R. was acting as solicitor for the plaintiff, and that he and his partner W. were both liable for the breach of his duty. The fact being established that down to March, 1883, both defendants were dealing as a firm with the plaintiff's affairs, the *onus* was thrown upon W. of shewing that his liability for the subsequent acts of his partner was terminated with the assent of the plaintiff; and as the evidence did not shew that W. had

given the plaintiff to understand that his liability was at an end, she was justified in believing that it was continued, so long as the defendants remained in partnership; and none of the circumstances mentioned above operated to absolve W. from liability.

Semble, that in this Province the business which is called scrivener's business is a part of the ordinary business of a solicitor.

Osler, Q.C., and *Douglas*, Q.C., for the plaintiff.
W. Cassels, Q.C., for the defendant Robinson.
Moss, Q.C., for the defendant Wilson.

[1ST JUNE, 1888.

GREEY v. SIDDALL.

Venue—Convenience—Cause of action—Leave to appeal—Terms.

The question for decision on an application to change the place of trial is, where can the action be most conveniently tried?

And where, in an action on a promissory note for the contract price of work done by the plaintiff in refitting a mill in the county of Middlesex, to which the defence was that the contract had not been carried out, the plaintiff had eight witnesses in Toronto or east of Toronto, and the defendant eight witnesses in Middlesex or west of Middlesex, upon the defendant's application to change the place of trial from Toronto to London, it was

Held, that London was the most convenient place for trial, and the venue was changed accordingly.

Per ARMOUR, C.J.—An action should be tried in the county where the cause of action arose.

Leave to appeal to the Court of Appeal was asked by the plaintiff because it was of importance to him in other litigation to have the question of venue decided, and was granted upon his undertaking to pay the costs of both parties of the appeal.

H. D. Gamble, for the plaintiff.
Shepley, for the defendant.

[5TH JUNE, 1888.

AMERICAN SURETY CO. v. NEELEY.

Bill of exchange—Payable to officer of corporation—Addition of word "secretary" after officer's name—Misappropriation by officer—Notice to transferee for value.

One Abbott, who was the secretary of the Supreme Council of Royal Templars of Temperance, absconded from the United States and came to Toronto, bringing with him a bank draft payable to his own order; after his name in the draft was the word "Secretary." Abbott bought some land from Neeley and indorsed the draft over to him in payment, and Neeley received the value of the draft from the bank on which it was drawn. The draft was admittedly the property of the Royal Templars, and was stolen by Abbott; and there was no doubt also that Neeley became the holder for value. The plaintiffs, who were sureties for Abbott, paid the Royal Templars the amount for which they were liable, took an assignment of the claim for the proceeds of the misappropriated draft, and brought this action against Neeley to recover the amount of it.

At the trial before STREET, J., at the Toronto Spring Assizes, 1888, the action was dismissed.

The plaintiffs appealed, and their appeal was heard before a Divisional Court composed of ARMOUR, C.J., ROSE, J., and STREET, J., on the 5th June, 1888.

J. J. Maclaren, for the appeal. There was enough on the face of this draft to warn Neeley that Abbott had not acquired it personally, but as an officer of some corporation or society. Neeley knew that Abbott was not buying land for the corporation of which he was secretary. The word "secretary" was enough to put him on inquiry, and he did not make inquiry, as the evidence shows. The fact of his not having inquired shews that he was not a *bona fide* holder. The defendant knew that Neeley was using this draft for private purposes. I refer to *Chalmers* on Bills, pp. 79-81; *Third National Bank* v. *Lange*, 51 Md. 138; *Shaw* v. *Spencer*, 100 Mass. 382; *Bailey* v. *Bidwell*, 13 M. & W. 73; *Babcock* v. *Beman*, 1 Kernan, N. Y. Appeals, 200; *Daniell* on Negotiable Instruments, s. 795 a.

Wallace Nesbitt, contra. This is not a restrictive indorsement. The word "secretary" is not notice of anything which could affect the defendant's title. I refer to *City Bank* v. *Barrow*, 5 App. Cas. 664; *Madden* v. *Cox*, 5 A. R. at p. 481; *Bell* v. *Gardiner*, 4 M. & G. 11; *London, etc., Banking Co.* v. *Groome*, 8 Q. B. D. at p. 294; *Jones* v. *Gordon*, 2 App. Cas. at p. 625.

ARMOUR, C.J.—I think this designation "secretary" was nothing more than a personal one, and could not charge Neeley with knowledge or means of knowledge that Abbott, although he had the right to indorse, could only do it in favour of some certain person, and so put him on inquiry. Neeley was not bound to know any more than that Abbott was a person designated as secretary; and this did not give him knowledge of any ulterior fact. Also, the Royal Templars, the assignors of the plaintiffs, put Abbott in a position to commit this fraud—a draft being made payable to him as their servant or officer—and I don't think any negligence on Neeley's part, if there was any, could avail the plaintiffs in the face of their assignors' action.

ROSE and STREET, JJ., concurred.

Appeal dismissed with costs.

[23RD JUNE, 1888.

STODDART v. WILSON.

Insolvency—Preference—Chattel mortgage to insolvent's wife—Application of wife's property to payment of creditor—R. S. O. (1887) c. 124.

W., being in insolvent circumstances and pressed by one of his creditors, G., procured his wife to convey her house and lot to G., who, by consent of Mrs. W., applied part of the purchase money in payment of W.'s debt to him and paid the balance to W., who made a chattel mortgage on his stock-in-trade to his wife for the amount of the purchase money which she should have received.

Held, reversing the judgment of ROSE, J., at the trial, that the chattel mortgage was void as against W.'s creditors under R. S. O. (1887) c. 124, and that it did not come within any of the exceptions in s. 3.

Per STREET, J., that the necessary preference of a particular creditor placed the transaction outside of the class which it was the intention of the legislature to protect.

Gibbons, for the plaintiff.

James Parkes, for the defendant.

[STREET, J., 13TH JUNE, 1888.

LALLY v. LONGHURST.

Incumbrancers—Mortgage action—Postponement of incumbrance prior in time—Forum for trying question of priority.

C. recovered judgment against L. in 1882 and placed a *fi. fa.* lands in the sheriff's hands, which was ever since regularly renewed; in 1883 L. bought land from the plaintiff and gave him back a mortgage for the purchase money. In this action for foreclosure, brought upon that mortgage, C. was added as a subsequent incumbrancer in the Master's Office, after judgment.

Held, that the plaintiff was not entitled to have the question whether C.'s execution should be postponed to his mortgage determined in the Master's Office or upon motion, unless by consent; the execution being prior in point of time, the order adding C. should be set aside.

The plaintiff was also allowed, following *Glass* v. *Freckleton*, 10 Gr. 470, to set aside his judgment, add C. as a party, and amend so as to raise the question of priority.

Radenhurst, for the plaintiff.

Hewson, for the defendant Constable.

[20TH JUNE, 1888.

In re BRITISH CANADIAN L. & I. CO. AND RAY.

Vendor and purchaser—Power of sale in mortgage—Variation from Short Forms Act—Notice of sale to incumbrancers.

The vendors were selling land under the following power of sale contained in a mortgage made under the Short Forms Act: "Provided that the company (the mortgagees) on de-

fault of payment for two months may without any notice enter on and lease or sell the said lands." After more than two months default the mortgagees entered, and after having done so made the contract for sale, having served notice of exercising the power of sale on some of the subsequent incumbrancers personally, and upon the solicitors of others.

Quære, whether the variations in the power from the statutory form prevented the Short Forms Act from applying.

Held, that if the Act were applicable the power of sale was properly exercised; if the Act were not applicable, then, taking the words of the power in their strictest sense, the vendors had done all that the power required; and the fact that they did give notice to some of the subsequent incumbrancers did not oblige them to give notice to all.

R. Grant, for the vendors.

Middleton, for the purchaser.

CHANCERY DIVISION.

[BOYD, C., 9TH APRIL, 1888.

KIRK v. BURGESS.

Receiver by way of equitable execution—Collection of rents of mortgaged lands—Creditors' Relief Act.

The defendant was a judgment debtor, and had no goods and chattels, but was the owner of several houses subject to mortgages, and his agent was collecting the rents and applying the surplus thereof, after payment of the annual charges on the houses, to the defendant's use for other purposes than the payment of the plaintiff's judgment. In an application by the plaintiff for the appointment of a receiver to collect the rents, it was

Held, that a receiver should be appointed, but as the land was incumbered, such appointment should be without prejudice to the rights of the mortgagees; and following *In re Pope*, 17 Q. B. D. 749, that although the ordinary remedies by way of execution are open, the Court has power to award equitable execution in any and every case, when it is just or

convenient so to do; and if the Court sees that any good end will be served by appointing a receiver, it will so order.

Held, also, that as the judgment debtor had appointed an agent, who was collecting the rents and paying certain creditors, it was more equitable to have a receiver as an officer of the Court collect and apply them for the benefit of the plaintiffs and other creditors entitled under the Creditors' Relief Act, R. S. O. (1887) c. 65.

H. Cassels, for the petitioner.

Tilt, Q.C., contra.

LOCKING v. HALSTEAD.

Vendor and purchaser—Mortgage for costs—Sale under power—Title—Recovery of deposit.

The plaintiff was a purchaser at a sale held under a power of sale in a $200 mortgage, taken for costs, only $30 of which had been incurred at the date of the mortgage; and paid his deposit. Before the purchase was completed the mortgagee's right to sell was raised as a question of title, but nothing was done to make the same good, and no evidence was given to show any amount due for costs until the property was sold again under a prior mortgage.

Held, on appeal from a report, that the mortgage was a valid security for no more than $30; that the mortgagee should deal with the security so as not to prejudice the mortgagor by a harsh and oppressive exercise of the power of sale; that the purchaser having notice would occupy no better position than the mortgagee; that a foreclosure for the full amount could not be upheld as against the application of the mortgagor to pay what was really exigible under the security; that the plaintiff was justified in refusing to complete the purchase and was entitled to recover back his deposit paid.

Hoyles, for the appeal.

Bain, Q.C., and *G. W. Field*, contra,

TELFER v. JACOBS.

Easement—Right of way—User of—In connection with property to which it is appurtenant—In connection with adjoining property.

P. being the owner of a certain block of land sold the southerly portion of it to the plaintiff and granted therewith certain rights of way over his remaining portion, but reserved certain rights of way over the portion sold "to himself *and his heirs* (this was by a subsequent deed extended to *his assigns*, which words were omitted by mistake) being the owner or owners, occupier or occupiers, of the land he now owns immediately to the north of the land hereby conveyed," etc. Some time after the owner of an adjoining property to the west became the owner of a small portion of the land to the north of the plaintiff's land, and to which the reserved right of way was appurtenant, and claimed that by virtue of such ownership he was entitled to a right of way to his adjoining property.

In an action for an injunction to restrain him from using such right of way in connection with such adjoining property;

Held, that the proper construction of the reservation of the right of way was to connect the use thereof with the beneficial enjoyment of the premises mentioned in the conveyances reserving the right of way, and that it was not intended to embrace a general right of user for all purposes; that there was a general right of user so far as the particular property was concerned, which would be enjoyed by every part owner of that property, how small soever his parcel might be; but it did not follow that the user could be extended for the more commodious enjoyment of adjoining land belonging to one of the part owners of the particular property; the user of a right of way for the accommodation of other parcels than the specific one to which it was appurtenant was in excess of the right. The defendants' ownership of part of the land to which the easement was appurtenant gave them the right of way for any purposes connected with the enjoyment of that part of the property, but it conferred no right upon them to burden the lanes over which the right of way existed by using them in connection

with the adjoining property to which the privilege was not annexed.

J. K. Kerr, Q.C., for the plaintiff.

James Maclennan, Q.C., for the defendants.

[26TH APRIL, 1888.

In re CENTRAL BANK OF CANADA AND YORKE.

Company—Winding-up—R. S. C. c. 129—Deposit receipt—Promissory note—Contributory—Set-off.

Y., in making a deposit on a Government contract, gave a marked cheque on the Central Bank, which cheque was subsequently cancelled and a deposit receipt substituted therefor. The bank obtained Y.'s note for the amount as a voucher for, or to cover, the amount of the deposit receipt. The bank went into liquidation on 3rd December, 1887; and on 20th January, 1888, Y., having been compelled by the Government to take up the deposit receipt and replace it with other security, took an assignment of it, and notified the bank.

On being threatened with a suit on the note, Y. filed a petition asking for leave to set up the deposit receipt against the note as a set-off.

Held, following *Ings* v. *Bank of Prince Edward Island*, 11 S. C. R. 265, that the maker of a note to the bank was a mere debtor and not a contributory; and that a debtor who is also a shareholder, and so a contributory, is not a contributory *quoad* the debt which arises out of an independent transaction; and for that reason s. 73 of R. S. C. c. 129 does not apply to this case.

Held, also, that the prohibition against acquiring debts for the purpose of set-off is limited to the case of contributories; as to debtors the law of set-off as administered by the courts is applicable as if the bank was a going concern; and, following *Re Moseley, etc., Coke Co., Barrett's Case*, 4 De G. J. & S. 756, that the right of set-off virtually arose, not by reason of dealings subsequent to the winding-up order, but of dealings prior thereto, because the engagement was to give

security to the satisfaction of the Government; and in taking up the deposit receipt and supplying better security he was only fulfilling that which he was obliged to do by a prior *bona fide* engagement.

Snelling, for the petitioner.

Foster, Q.C., for the liquidators.

[FERGUSON, J., 1ST JUNE, 1888.

HOWE v. CARLAW.

Will—Devise for maintenance—Expenses covered by devise—Estate charged therewith.

A testator by his will provided as follows: "I will and devise that my said executors and trustees shall comfortably provide for and maintain and clothe my father and mother during their lifetime, and that the same shall be a charge upon my estate." The father and mother recently died, and during their last illness certain expenses were incurred for medical attendance, nurses, etc., and after their death for funeral expenses and English solicitors' fees endeavoring to collect the several accounts for same.

Held, that these expenses were covered by the provision for maintenance, and an order was made for their payment out of the testator's estate.

J. Hoskin, Q.C., for the plaintiffs.

Foy, Q.C., for the defendants.

[21ST JUNE, 1888.

In re TRUSTEES OF THE EAST PRESBYTERIAN CHURCH AND McKAY.

Vendor and purchaser—Sale of church property—Publication of notice—Weekly paper—Daily paper—R. S. O. (1887) c. 237, s. 13.

The trustees in selling some church property under R.S.O. (1887) c. 237, s. 13, advertised on the same day of the week for four successive weeks in a daily paper.

Held, not a sufficient compliance with the provision of the statute directing publication in a "weekly paper" to make a proper sale of the lands, and that the purchaser had good ground for refusing to accept the title offered.

Geo. Bell, for the vendors.

T. P. Galt, for the purchaser.

COMMON PLEAS DIVISION.

[IN BANC, 24TH MARCH, 1888.

REGINA v. HAGERMAN.

Criminal law—Forgery—Witness interested—Corroboration—R. S. C. c. 174, s. 218—Partnership.

By s. 218 of R. S. C. c. 174, "The evidence of any person interested, or supposed to be interested, in respect of any deed, writing, or instrument, or other matter given in evidence on the trial of any indictment or information against any person for any offence punishable under the 'Act respecting forgery,' shall not be sufficient to sustain a conviction for any of the said offences unless the same is corroborated by other legal evidence in support of such prosecution."

The prisoner was indicted for forgery in feloniously uttering a cheque signed by H. J. & Co. on the Quebec Bank, which he had altered from $400 to $1,400. The evidence in support of the forgery was that of J., who, though a member of the firm when the cheque was made, had ceased to be such at the time of the trial, and who had been released by his partner from all liability and disclaimed any interest in the cheque. There was some evidence of the liabilities of the firm to creditors at the time of J.'s withdrawal.

Held, ROSE, J., dissenting, that J. was not a person interested, or supposed to be interested, within the meaning of the Act, and his evidence did not require corroboration.

J. K. Kerr, Q.C., for the Crown.

Colin Macdougall, Q.C., for the prisoner.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1887.

SMITH v. MILLIONS.

Survey—Plan, part of description in deed—Effect of.

The rule of construction in cases of private plans, where a deed or plan is referred to as part of the description, is to read it into the deed.

Carter v. *Grasett*, 10 S. C. R. 105, followed.

In an action to determine the boundary between certain lots on a plan, the defendant's surveyor, instead of being governed by the plan, went behind it, making a new survey; and also took the apparent angles on the plan instead of the measurements.

Held, erroneous.

W. Cassels, Q.C., for the plaintiff.

C. Millar, for the defendant.

[11TH FEBRUARY, 1888.

SHEARD v. LAIRD.

Undue influence—Deed procured through threats, etc.—Setting aside.

The defendant, a merchant and active business man, had indorsed a note for G. Subsequently G. made an assignment for the benefit of his creditors, and on the defendant requiring security G.'s wife gave him her note for the amount. She held some property which had been purchased by her husband and conveyed to her, which was to be sold and the note paid. G. sold the land, but instead of paying the note absconded leaving his wife. The defendant then went to Mrs. G., and by the use of abusive language and threats of criminal prosecution against her husband and of exposure of herself and him in the newspapers, being of delicate constitution, frightened her into procuring her mother, a very old woman in feeble health, influenced by the communication of the threats to her, to get the deed from her solicitor of a small property she owned, defendant giving strict injunctions not to inform the solicitor of the object, lest he should dis-

suade her, and to execute a deed to the defendant conveying the property absolutely to him in payment of the debt. merely giving her back an informal memorandum evidencing her right to obtain a reconveyance on payment of the debt. At the same time he procured Mrs. G. also to execute the deed, which contained a clause barring dower she had in the land, and which was absolute and unconditional and without any right to her to redeem. The deed was executed in the office of the defendant's conveyancer without anyone being present to advise the plaintiffs.

Held, reversing the judgment of ARMOUR, C.J., at the trial, that the deed could not be supported as against the mother and must be set aside; and also under the circumstances as against Mrs. G.

C. A. Durand, for the plaintiffs.

C. Millar, for the defendant.

[10TH MARCH, 1888.

O'SULLIVAN v. LAKE.

Valuator—Liability of—Misdirection.

The defendant L., who was a professional valuator, was employed by the plaintiff to personally investigate the security offered for a loan on real estate, and to check the valuation of a local valuator. L. visited the property and reported, in effect agreeing with the local valuator, that the property was worth considerably more than the amount proposed to be lent, and that the loan could be safely made for the sum proposed, for which report he charged and was paid a fee.

The loan was effected, and default having occurred in its repayment, the property was offered for sale, when it was found impossible to sell for anything like the mortgage money. In an action for negligence in valuing the property the jury found for the plaintiff. The Judge at the trial directed the jury that the fact that the defendant did not obtain the opinion of other persons as to the value of land in the neighbourhood was evidence of negligence.

Held, GALT, C.J., dissenting, this was misdirection.

It appeared from the evidence that the mortgagor had endeavoured to procure a loan for a similar amount on the same property from a company in which the defendant L. was a director, and that the loan was not effected, having been abandoned by the mortgagor. The Judge at the trial, although he directed the jury that there was no evidence that the defendant had acted with intentional dishonesty, pressed upon their notice, with other observations, the inquiry: "Why was not the original transaction carried out?"

Held, per ROSE and MACMAHON, JJ., that these observations tended to create a prejudice in the minds of the jury which was not warranted by the facts.

K., a respectable man living in the neighbourhood of the property, in his evidence valued the land at from $200 to $300 per acre, but the Judge told the jury that K. was not in the land business and had no knowledge of the value of the property.

Per ROSE, J.—The observation as to K. was a practical withdrawal of his evidence from the jury.

Per GALT, C.J.—There was evidence of negligence to go to the jury, particularly in the defendant L. not making inquiries of others in the neighbourhood as to the value of the land.

A new trial was therefore directed.

Osler, Q.C., for the plaintiff.

Robinson, Q.C., and *J. J. Maclaren*, for the defendant Lake.

Moss, Q.C., for the defendant Balfour.

IN CHAMBERS.

[ROSE, J., 19TH JUNE, 1888.

REGINA *ex rel* TAVERNER v. WILLSON.

Municipal elections—Addition of new territory to city—Disqualification of voters—R. S. O. (1887) c. 184, ss. 82, 89.

Where a city made additions to its territory, and thereby included within its corporate limits a portion of an outlying township;

Held, that, regard being had to the provisions of s. 89 of the Municipal Act, R. S. O. (1887) c. 184, persons who, but for such action on the part of the city, would have been entitled to vote in the township, were thereby debarred from voting at the township municipal election next ensuing, notwithstanding that the nomination of candidates for such election took place before the addition; and notwithstanding the prohibition contained in s. 82 of the Act to the raising of questions concerning the qualification of voters.

A. H. Marsh, for the relator.

Aylesworth, for the respondent.

[STREET, J., 25TH MAY, 1888.

ANDERSON v. WIDGERY.

Landlord and tenant—Ejectment—Payment of rent pendente lite—Receiver—Security.

Action of ejectment against Widgery, the plaintiff's tenant, and Bonner, Widgery's sub-tenant. Defence that on faith of plaintiff's verbal agreement to extend the term of Widgery's lease, Bonner had been induced to take a sub-lease extending beyond the term granted by the indenture of lease, and had been put to considerable expense in fitting up the premises to suit him. The case was tried before ROBERTSON, J., in November, 1887, and judgment given for the plaintiff: "Counsel for the defendants asking that the entry of judgment should be stayed until the fifth day of the next sittings of the Divisional Court, the Court was pleased to grant the said stay of proceedings upon the appointment of a receiver as hereinafter mentioned;" and an order was made appointing the plaintiff's husband receiver upon giving security, no limit as to the duration of his appointment being fixed by the order. The defendants did not appeal to the Divisional Court; the defendant Widgery did not appeal at all; but the defendant Bonner appealed to the Court of Appeal, and in due course the plaintiff entered judgment. In order to stay execution Bonner gave security that during the possession of the property by him he would not commit, or suffer

to be committed, any waste of the property, and if the judgment should be affirmed would pay the value of the use and occupation of the property from the time of the appeal until the delivery of possession. This security was perfected in December. Between the date of the trial and the entry of judgment and the perfecting of this security, one month's rent fell due and was paid by Bonner to the receiver. No further rent was paid by Bonner. In May the plaintiff applied for an order giving the receiver liberty to distrain for rent alleged to be due by Bonner, and the Master in Chambers on the 23rd May granted the liberty asked. From this order Bonner appealed to a Judge in Chambers.

H. Cassels, for the appeal.

W. Davidson, contra.

STREET, J., varied the order of the Master by providing for a stay of the distress on condition of security for the rent being given, holding that notwithstanding that the defendant Bonner had given security to pay an occupation rent in case of the judgment being affirmed, he was bound either to pay rent, or to give security to pay rent, to the receiver, at the end of the litigation, in the event of the judgment being set aside.

MANITOBA.

IN THE QUEEN'S BENCH.

[FULL COURT.

DICK v. HUGHES.

Attachment of debts—Jurisdiction of County Judge—Garnishee out of jurisdiction.

A County Court Judge has power to set aside a garnishing order made in a Queen's Bench action.

A garnishing order was set aside upon it appearing that the garnishee did not reside within the jurisdiction, but was there, when served, only temporarily.

MULLIGAN v. HUBBARD.

Illegal transaction — Recovery of lands conveyed for illegal purpose— —Pleading.

A defendant who wishes to rely on the illegality of a transaction "must clearly put forward his own scoundrelism" in his answer; KILLAM, J., dissenting.

Where land has been voluntarily conveyed to enable the grantee to hold it for some illegal purpose, and that purpose has not been carried out, the grantor is not prevented from taking proceedings to recover back the land; KILLAM, J., dissenting.

SHAW v. CANADIAN PACIFIC R. W. CO.

Pleading—Declaration—Contract or tort.

The plaintiff, having sustained personal injury and loss of baggage in a railway accident, obtained leave to proceed in an action provided he declared in contract. His declaration contained the following counts:

1 and 2. Allegation of contract to carry; breach, that defendants did not safely carry; but owing to negligence goods lost.

3 and 4. Allegation of contract to safely and securely carry; breach, that defendants did not safely and securely carry; but owing to negligence plaintiff was injured.

5 and 6. The same as 1 and 2 without the allegation of negligence.

Held, reversing DUBUC, J., that the first four counts were in contract and not in tort.

2. That the counts 1 and 2 were in reality the same as 5 and 6, and should therefore be struck out as cumbering the record.

The defendants pleaded to counts 5 and 6 a condition of the contract by which their liability was restricted to $100, and payment into Court of that amount.

To this plea plaintiff replied negligence within sec. 24 of the Con. Rway. Act, 1879.

Held, that this replication should not be struck out, but if objectionable should be demurred to.

BATHGATE v. MERCHANTS' BANK.

Bill of sale—Statement of consideration.

The full and true consideration for which a bill of sale is given must be set out in it, with substantial accuracy, otherwise the bill is void.

G., being indebted to B., gave his note for the amount, which B. discounted at a chartered bank. As security for the discount G. executed a chattel mortgage to the bank. At maturity B. took up the note. Afterwards he procured from G. a bill of sale of the goods. The bill recited the mortgage and an agreement to sell the goods for $100 over the mortgage. The expressed consideration was the premises and $100. The $100 was not paid or intended to be paid.

Held, 1. That the mortgage was void under the Banking Act.

2. That although the debt upon the notes might have been a sufficient consideration for the bill of sale, yet as that was not the consideration stated the bill was void.

MERCHANTS' BANK v. McLEAN.

Attachment of debts—Garnishing order—Interpleader—Garnishee claiming interest in fund.

A garnishing order having been served by the plaintiffs, the garnishees paid $667.46 into Court, suggesting the names of several claimants to the fund. One of these, F., had commenced an action against the garnishees, claiming $1,000 to be the amount due. Upon a summons taken out by the plaintiffs an order was made barring all the claimants except the plaintiffs and F. (including the assigns of F.), staying F.'s action, and directing interpleader between F. and the plaintiffs. Upon appeal,

Held, 1. That the order might properly have barred the other claimants.

2. That the interpleader order could only be made at the instance of the garnishees.

3. That the garnishees claiming an interest in the fund, they could not have interpleaded.

OSBORNE v. CAREY.

Debtor and creditor—Voluntary transfer to debtor's wife—Attacking as fraudulent—Onus of proof—Evidence.

C., being indebted to the plaintiffs in an amount exceeding $1,600, part of which was shortly coming due, sold his entire business, receiving $1,000 in cash and $3,500 in notes. He transferred the notes and all of his book debts to his wife, the defendant, and shortly afterwards left the country, making no provision for payment of the plaintiffs' claim.

Upon a bill filed to set aside this transaction the wife swore that she had lent to C. large sums of money, and that the transfer was in consideration of this indebtedness.

Held, reversing BAIN, J., (1) That the unsupported and bald statement of a loan by a wife to a husband was not sufficient evidence of a legal indebtedness.

(2) The onus is upon the grantee in a voluntary conveyance, when it is attacked by creditors, to show the existence of other property available for creditors.

(3) The defendant, having sold the notes after bill and injunction served, was directed to account for the money obtained for them.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [8TH MAY, 1888.

MERCHANTS' BANK v. LUCAS.

Evidence—Court of Appeal—Application for leave to adduce further evidence.

The defendants, upon their appeal from a Divisional Court, applied for leave to adduce further evidence to corroborate or strengthen that already taken, upon a point which was argued before the Divisional Court and decided adversely to the applicants.

The application was refused.

General remarks *per* PATTERSON, J.A., on the reception of further evidence by appellate Courts.

McCarthy, Q.C., for the applicants.
Robinson, Q.C., contra.

C. C. WENTWORTH] [23RD DECEMBER, 1886.

COATTS v. KELLY.

Fraudulent preference—Assignment for benefit of creditors—48 V. c. 26.

One Chamberlain, who was in insolvent circumstances and indebted to K. in $120, was pressed by him for payment, when he agreed to sell K. a horse for $110 in part payment, and about the 15th August, 1885, delivered the horse in pursuance of such agreement. K. kept possession of and worked the horse for one day, when he lent him to Chamberlain, who continued to use him in his business until the early part of October following, when he returned the horse to K., who

thenceforward retained possession of him. On the 31st October Chamberlain executed an assignment to the plaintiff in pursuance of the Act 48 V. c. 26, respecting assignments for the benefit of creditors. There was evidence tending to shew that Chamberlain was insolvent when he sold the horse, but none that K. knew or had reason to know that fact.

In an action against K. to recover the horse on the ground of fraudulent preference the Court below non-suited the plaintiff, and on appeal to this Court that judgment was affirmed with costs.

J. J. Scott, for the appellant.

Moss, Q.C., and *Campion*, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23RD JUNE, 1888.

YARWOOD v. HART.

Breach of promise of marriage—Evidence—Corroboration—R. S. O. (1887) c. 61, s. 6.

In an action for breach of promise of marriage, the plaintiff swore to the promise, and the defendant denied it and alleged that the plaintiff had been his mistress, which she denied. Witnesses were called on her behalf who shewed that the parties were of the same social rank; that there was nothing unreasonable or improbable in their becoming engaged to be married; that he formed her acquaintance in 1880 and then commenced and continued for about six years to pay her attention, during which time his visits to her were constant; that he took her out driving frequently; that she received the attentions of no other man during that period, nor did he pay attention to any other woman; that he was received by her as a lover; that he went to see and sat up with her father during his last illness; and that he made her frequent pre-

sents of jewellery, wearing apparel, and money. Letters also were put in by the plaintiff, written by the defendant to her about the time it was alleged he had broken off their engagement, addressing her in loving terms. The jury found that there was a contract, and a breach by the defendant, and that the defendant had failed to prove his defence; and they gave the plaintiff damages.

Held, that the evidence given was material evidence in support of the promise to marry, and that it furnished the corroboration of the plaintiff's testimony required by R. S. O. (1887) c. 61, s. 6.

It was contended that the evidence was as consistent with the keeping by the defendant of the plaintiff as his mistress, as it was with an engagement to marry.

Held, that the presumption was in favour of the moral and against the immoral relationship; and the fact that the defendant set up the immoral relationship as a defence did not render the evidence less material in support of the promise.

Clute, for the plaintiff.

Ritchie, Q.C., for the defendant.

[ARMOUR, C.J., 29TH JUNE, 1888.

COUSINEAU v. CITY OF LONDON FIRE INSURANCE COMPANY.

Mistake—Effect of offer—Release—Costs "as between solicitor and client."

A party cannot be released from an offer, deliberately made to and accepted by the opposite party, on the ground that his offer turns out to have seme different effect from what he supposed it would have.

Costs "as between solicitor and client" in an action include such costs as a solicitor can tax against a resisting client under the general retainer only to prosecute or defend the action.

Aylesworth, for the plaintiff.

C. Millar, for the defendant.

[FERGUSON, J., 19TH JUNE, 1888.

SMITH v. FLEMING.

Costs—Covenant for renewal lease, construction of—Costs of lease—Costs of reference and award.

It was provided in a lease that if the lessee should desire a renewal for a further term and should give a defined notice, containing the name of an arbitrator, the lessors should and would, *at the expense of the lessee*, execute a new lease at such increased yearly rent as might be determined by the award of three indifferent arbitrators, or a majority of them.

Held, that the costs of the lease were provided for both by law and by the above clause, and must be borne by the lessee; but the costs of the arbitration were not provided for by the clause, and each party must bear his own costs of the reference and half the costs of the arbitrators' fees, for which the action was brought.

A. C. Galt, for the plaintiffs.

S. H. Blake, Q.C., and *Tilt*, Q.C., for the defendant Fleming.

Arnoldi, for the defendants the Rector and Wardens of St. James' Church, Toronto.

[FALCONBRIDGE, J., 13TH FEBRUARY, 1888.

In re WEST MIDDLESEX DOMINION ELECTION PETITION.

McNEIL v. ROOME.

Elections—Hiring vehicles—Conveying voters to poll—R. S. C. c. 8, ss. 88, 91.

Where it was charged that agents for the respondent had hired from certain livery stable-keepers vehicles for the purpose of conveying voters to the poll, and paid for the use of the same at the election, and the evidence shewed that one of the livery-stable keepers (who were in partnership together) had acted as agent for the respondent, and that under his partnership agreement with his partner had paid the latter

half-prices for each vehicle taken out by himself, and that the vehicles in question purported to have been taken out by himself, and he afterward paid half-prices on account of the same to his partner,

Held, that this amounted to a corrupt practice under R. S. C. c. 8, ss. 88, 91, and the fact of W. being a member of the firm did not make it less a "hiring" of the vehicles.

S. H. Blake, Q.C., and *C. J. Holman*, for the petitioner.

W. R. Meredith, Q.C., *Becher*, Q.C., and *McNeil*, for the respondent.

CHANCERY DIVISION.

[IN BANC, 30TH JUNE, 1888.

REGINA v. WEBSTER.

Municipal corporation—By-law—Favouritism—Delegation of functions—R. S. O. (1887) c. 184, s. 496, s-s. 14.

On 7th January, 1880, the council of the town of Parkdale passed a by-law entitled a by-law to regulate or prevent the carrying on of manufactures or trades dangerous in causing or promoting fire, whereby it was provided that no such manufacture or trade should be allowed to be carried on within 300 feet of any other building, and a fine of from $5 to $20 imposed for each day that a violation of the by-law continued, with distress on default of payment, a nd imprisonment for a period not exceeding 21 days in default of sufficient distress.

Afterwards they passed another amending by-law providing that the restriction should not exist if the owners of such buildings within 300 feet consented in writing; the said consent, however, to be submitted for approval by the Chairman of the Board of Works.

Held, that the by-law as amended was invalid within the principles laid down in *Re Kiely*, 13 O. R. at p. 457, and in *Re Nash and McCracken*, 33 U. C. R. 181, viz., because by requiring the consent of the owners of the adjoining buildings to be obtained, it constituted these persons the judges of the right asked for and divested the Council of the power they should personally exercise, and by requiring the approval of the Chairman of the Board of Works it permitted favouritism,

and all persons who desired to follow the same trade were not placed or might not be placed on the same footing.

It was also bad because it delegated in part the exercise of the judgment and discretion that should be exercised by the existing body alone under R. S. O. (1887) c. 184, s. 496, s-s 14.

Shepley, for the prosecutor and the magistrate.

G. W. Holmes, for the defendant.

[BOYD, C., 11TH JUNE, 1888.

SMITH v. METHODIST CHURCH.

Will—Mortmain—Charitable uses—Methodist Church—29 Geo. II c. 36—14 & 15 V. c. 142—47 V. c. 88.

A testator by his will devised all his property real and personal to a trustee upon trust to convert the same into money and hold the proceeds upon trust, amongst other things, to pay to the treasurer for the time being of the Superannuation fund of the Methodist Church $1,000.

Held, that the bequest was not void under 29 Geo. II c. 36, which is commonly but inaccurately called the Mortmain Act, but is really an Act to prevent the devising of lands for charitable uses. The statute 14 & 15 V. c. 142, which incorporated certain benevolent societies under the name of the Connectional Society of the Wesleyan Methodist Church in Canada, and which provides that the corporation may take up, grant, devise, or otherwise dispose of any land or interest in land, and vests in the corporation all lands, etc., which should thereafter be granted, devised, or bequeathed in any manner or way whatsoever in favour of the said corporation, amounts to and indicates a repeal in favour of this corporation of so much of the Charitable Uses Act of 1736 as prohibits persons devising lands to a charity.

The testator further provided that the trustee should after meeting the prior bequests directed in the will pay all the rest and residue unto the treasurer for the time being of the Trustee Board of the Brant Avenue Methodist Church to be applied by them or their successors in reducing the debt existing against the church property.

Held, that this residuary bequest was invalid, for there was no special law empowering the said trustees to hold lands except under the statutes already referred to incorporating the Connectional Society of the Wesleyan Methodist Church in Canada and 47 V. c. 88, s. 6, being the late statute incorporating the Methodist Church. The first statute, 14 & 15 V. c. 142, was intended to confer benefits mainly upon two objects (1st) the book and printing establishment, and (2nd) the Superannuated Preachers' Fund. It had no reference to individual churches at all, and all that is intended to be expressed by the later statute, 47 V c. 88, s. 6, is that, as the Connectional Society has been merged in the new and larger corporation of the Methodist Church, the latter corporation shall stand in the place of the other with all its powers, rights, etc., for the purposes and objects thereof, that is to say of the Connectional Society; and the language does not warrant the construction that the special privileges granted by the Act of 1851 are to be extended to all the purposes and objects of the new ecclesiastical corporation, and therefore the argument that s. 6 of 47 V. c. 88 enlarges indefinitely the capacity of the new corporation—the Methodist Church—to hold land for all purposes, including that contemplated in the above will for the endowment of particular churches of the body, could not be sustained. Here the devise was not six months before the death of the testator, as required by the general law, R. S. O. (1887) c. 216, s. 19.

Harley, for the plaintiff.

Riddell, for the next of kin.

Osler, Q.C., for A. W. Semmons and M. H. Phillips.

J. J. Maclaren, for the Methodist Church.

Brewster, for the trustees of the Brant Avenue Congregation of the Methodist Church.

[FERGUSON, J., 21ST JUNE, 1888.

STEVENSON v. McHENRY.

Sale of land—Misrepresentation—House described as "solid brick"—Insufficient description of lands in agreement.

Two houses were built with extensions in rear in a terrace or row, the outside walls of the terrace and the extensions

being brick, but the inside walls between the houses themselves and the adjoining houses and also between the extensions and the main houses to the height of the roofs of the extensions being wood, lathed and plastered, but the outside rear walls of the houses above the roofs of the extensions being brick resting upon timbers at the top of the wooden walls below.

Held, not to be "solid brick" houses.

The property in an agreement for exchange was described as "135 feet on G. Avenue, the same being 337 feet west from R. Avenue, Parkdale, on the north side of said Avenue."

It was shown that R. Avenue was the west boundary of Parkdale, and G. Avenue a street in it, which as such street would have its termination at R. Avenue, but it extended across R. Avenue as a road or way outside of Parkdale, and no further description of said land was given, such as the depth or by reference to a plan or otherwise.

Held, that the property was not sufficiently described.

Moss, Q.C., for the plaintiff.

Laidlaw, Q.C., for the defendant.

[27TH JUNE, 1888.

In re HARGIN and FITZINGER.

Will, construction of—Devise—Properties—Real estate covered—Occupation of tenant—Possession.

A testator by his will provided as follows:—I will and bequeath to * * C. H. all properties, money, and personal effects now in my possession for her own and sole use, to be disposed of as she may see proper."

Held, that this devise passed real estate.

Held, also, that real estate in the occupation of a tenant at the time of the testator's death was in the possession of the testator.

Hoyles, for the vendor.

C. J. Holman, for the purchaser.

In re MARTIN TRUSTS.

Absconding trustee—Removal—Ex parte order.

A petition for the removal of a trustee, who had absconded from the province, and for the appointment of a new trustee.

The petition had not been served on the absconding trustee.

C. J. Holman, for the petitioners, moved *ex parte* for an order, and asked that it might issue as prayed without service on the absconding trustee, citing *In re Nicholson's Trusts*, W. N. 1884, p. 76; *Re Martin Pye's Trusts*, 42 L. T. N. S. 247.

FERGUSON, J., on the authority of the cases cited, made the order as asked.

[29TH JUNE, 1888.

WRIGHT v. COLLINS.

Will, construction of—Wrong description—Falsa demonstratio.

Where a testatrix by her will devised as follows:—"I give, devise, and bequeath to my husband all my real estate composed of the north-west quarter of lot number ten in the *sixth* concession of the township of Mersea," and it appeared that she had never owned such lands, but had owned and lived upon the north-west quarter of lot ten in the *fifth* concession of the township of Mersea,

Held, that by virtue of the fact that the will, taken apart from the erroneous description, contained a gift or devise of all the real estate of the testatrix, which would, taken alone, be a sufficient description for the purpose of passing the lands really owned by the testatrix to the plaintiff, the part of the description referring to lot ten in concession six might be rejected as *falsa demonstratio*, and the lands really owned by the testatrix held to have passed to the devisee.

Hickey v. *Stover*, 11 O. R. 106; *Re Shaver*, 6 O. R. 312; *Summers* v. *Summers*, 5 O. R. 110, distinguished.

J. B. Clarke, for the plaintiff.

S. H. Blake, Q.C., for the infant defendants.

[ROBERTSON, J., 6th JULY, 1888.

In re INGERSOLL, GRAY v. INGERSOLL.

Registrar of deeds—Fees—Salary—Apportionment—R. S. O. (1877) c. 111, ss. 98-104.

Appeal from the report of the Master of Woodstock made in reference to the claim of the county of Oxford against the estate of J. I. in respect to the proportion of the fees received by him during the year 1886 in his capacity as registrar of deeds.

J. I. died 9th August, 1886, having received up to that date $4,042.75. His deputy filled the vacant position from 9th to 25th August, 1886, receiving $272.65 in fees, and the present registrar was then appointed and received during the balance of the year $2,444.85, making a total received of $6,760.25.

The county made their claim under R. S. O. (1877) c. 111, ss. 98 to 104, and it was contended on their behalf that the account should be taken by allowing one salary to all these officers, based on the sum of $6,760.25, making the deduction on said amount, apportioning such deduction *pro rata* amongst the three incumbents, and charging each with the amount so ascertained.

Held, contra, that the Master was right in rejecting this basis of computation and in allowing the county only on the amounts received by each of the several persons, thus letting the two latter out from any contribution and making the contribution due from the estate of J. I. $317 only, instead of $1,074, which would have been due on the other computation.

The meaning of s. 98 of the statute is that each registrar is not to account to the county for any sum whatever until after he has received the sum of $2,500, after which he is entitled to receive 90 per cent. of the excess of $2,500 up to $3,000, and after that 80 per cent. up to $3,500, and so on according to the scale provided by the subsequent section. The Act, being in derogation of the rights of registrars as they previously existed under the common law, must be construed strictly.

Ball, Q.C., for the appellants, the corporation of Oxford.
Wallace Nesbitt, for the executor.

In re GRACEY AND TORONTO REAL ESTATE CO.

Vendor and purchaser—Married woman—Conveyance by—Joinder of the husband.

A married woman, married between 1859 and 1872, acquired before the year 1868 a vested remainder in land subject to a life estate, and in 1886, the life tenant still being alive, conveyed her remainder by deed without her husband.

Held, that the conveyance was valid to pass the whole estate, and the life tenant having since died, a good title in fee simple under the conveyance could be made.

E. Douglas Armour and *G. G. S. Lindsey*, for the vendor.
E. T. Malone, for the purchaser.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 10TH MARCH, 1888.

BOND v. CONMEE.

Illegal arrest and imprisonment—Conviction for having liquors near public works—Destruction of liquors—Necessity of quashing conviction before action commenced—Putting in new conviction after return to certiorari—Notice of action—Statement of cause of action and service—Sufficiency of defence of "not guilty by statute"—Necessity to refer to section of statute—Venue—Order for destruction of liquors—Non-production of at trial—Admissibility in Divisional Court.

Action against two justices of the peace for the illegal and malicious arrest of the plaintiff and the destruction of his stock of liquors. The defendant was arrested and convicted for having liquors for sale near public works, and imprisoned.

Writs of *habeas corpus* and *certiorari* were issued, and on the return thereof the plaintiff was discharged. Under a writ of *certiorari* directed to the defendants the conviction was returned not under seal. The return was made by the defendants' solicitor, to whom all the papers, including the conviction, had been delivered by the defendants to look over, and in his affidavit accompanying the return he swore that the conviction returned was the one made by the defen-

dants. It was objected that the conviction should have been quashed before action brought.

Held, by ARMOUR, J., at the trial, that not being under seal this was not necessary.

Haacke v. *Adamson*, 14 C. P. 201; and *McDonald* v. *Stickney*, 31 U. C. R. 581, followed.

It was urged at the trial and in the Divisional Court that the alleged return to the *certiorari*, being a *certiorari* in aid of a *habeas corpus*, did not preclude the defendants from putting in a properly sealed conviction. No such conviction however was produced, but one of the defendants stated that in his belief such conviction existed.

Held, that as the return was made to the *certiorari* directed to the defendants, and did not refer to the *certiorari* in aid directed to the gaoler, and in face of the solicitor's affidavit, the conviction could not be received.

Per ROSE, J.—And for the additional reason that the evidence disclosed a want of *bona fides*.

The notice of action stated that the cause of action arose "in the month of May, 1887, at said village of M., and in the town of P.;" and was not served personally on the defendant C., but was served on his agent at his head office; also at his place of residence, and on his solicitor. The statement of claim alleged the service of such notice. The only defence was not guilty by statute, R. S. O. c. 73, s. 11, the section referring to notice being s. 10.

Held, by ARMOUR, J., and affirmed by the Divisional Court, that the statement of time and place as well as the service was sufficient.

Oliphant v. *Leslie*, 24 U. C. R. 398, followed.

Held, also, by the Divisional Court, that no objection could now be taken to the notice, as under the O. J. Act and rules when the defence of "not guilty by statute" is set up, the particular section of the statute relied on must be pleaded.

The venue was laid at Toronto, but was changed by order, and the action was tried at Port Arthur, in the district where the cause of action arose.

Held, that in such an action as this the venue need not be laid where the offence is committed.

Legacy v. *Pitcher*, 10 O. R. 620, followed.

Per ROSE, J.—The point was not taken in the motion paper, and this was not a case in which to review *Legacy* v. *Pitcher*, even if opened for review by *Arscott* v. *Lilley*, 14 A. R. 283.

From the village of M., where the arrest and conviction took place and the liquors were destroyed, to the Canadian Pacific Railway, then in course of construction and over fifty miles distant, the railway company had constructed a colonization supply road for the conveyance of supplies for the railway. No proclamation was issued under R. S. O. (1877) c. 32 proclaiming this a public road; but subsequently the Dominion Government, by proclamation issued under R. S. C. c. 151, proclaimed the ten miles on either side of the supply road to be in the vicinity of a public work.

Held, by ARMOUR, J., and affirmed by the Divisional Court, MACMAHON, J., doubting, that the village of M. was not within three miles of a public work under R. S. O. (1877) c. 32.

Per GALT, C.J.—The place did not come within either Act, no proclamation having been issued at the time.

It was urged in the Divisional Court that the order for the destruction of the liquors, with a certificate indorsed stating that the liquors were destroyed thereunder, though not produced at the trial, should now be received, and was a bar to the plaintiff's claim in respect of the destruction of liquors.

Per GALT, C.J.—There was no power to make the order, the authority to do so being based on R. S. O. (1877) c. 32, which was not made applicable; and therefore the order should not be received in evidence.

Per ROSE and MACMAHON, JJ.—The order was not dependent on the conviction of the plaintiff, and came with R. S. O. (1877) c. 73; the destruction was an act under an order; and the order must be quashed to avoid the protection afforded by s. 4; but

Per ROSE, J.—The order should not now be received; in any event there must be a new trial; but this would be of doubtful value, as it would only be on payment of costs of the trial and the motion.

Per MACMAHON, J.—The order should be received, but a new trial should be granted on this part of the case.

G. T. Blackstock, for the plaintiff.

McCarthy, Q.C., for the defendants.

[29TH JUNE, 1888.

DISHER v. DISHER.

Writ of attachment—Setting aside—Powers of County Judge—Absconding Debtors' Act.

Although a County Court Judge has power under s. 2 of the Absconding Debtors' Act, R. S. O. (1877) c. 66, to order the issue of a writ of attachment from the High Court, such Judge has no jurisdiction to entertain an application to set aside the writ.

Aylesworth and *Lancaster*, for the plaintiff.

W. M. Douglas, for the defendant.

LIVERNOIS v. BAILEY.

Costs, scale of—Setting off costs—R. S. O. (1877) c. 50, s. 347, s-s. 3.

In an action for damages for breach of a contract, the jury awarded the plaintiff $68.50, and the trial judge entered judgment for that amount and certified to entitle the plaintiff to costs on the Division Court scale and to prevent the defendant from setting off High Court costs.

On appeal, a Divisional Court varied the order as to costs so as to give the plaintiff such costs only as he would have recovered under R. S. O. (1877) c. 50, s. 347, s-s. 3, where the judge at the trial did not certify.

Held, that there was no reason for making the defendant pay extra costs for the mistake of the plaintiff in bringing his action in the High Court.

J. W. Nesbitt, for the plaintiff.

Aylesworth and *H. H. Collier*, for the defendant.

[STREET, J., 23RD MAY, 1888.

McARTHUR v. NORTHERN AND PACIFIC JUNCTION R. W. CO.

Railway—Company incorporated by Dominion Parliament—Line built through lands under timber license—Timber cut within and outside six rod belt—Damage by reason of railway—Limitation of action.

The defendants, a railway company incorporated under an Act of the Parliament of Canada, built their railway through lands in this Province, the fee of which was in the Crown, but was under a timber license issued by the Ontario Government to the plaintiffs, and cut down and removed the timber both within and outside of the six rod limit mentioned in R. S. C. c. 109, s. 6, s.-s. 12. The timber was all cut more than six months before action brought.

Held, that as to the timber cut within the six rod limit, this was damage or injury sustained "by reason of the railway" under R. S. C. c. 109, s. 272, and the action was therefore barred by reason of its not having been brought within the six months; but that as to the timber cut outside of the six rod belt, the plaintiffs were entitled to damages.

A. R. Creelman, for the plaintiffs.

E. Martin, Q.C., and *W. Cassels*, Q.C., for the defendants.

IN CHAMBERS.

[ARMOUR, C.J., 29TH JUNE, 1888.

In re WHITE v. GALBRAITH.

Mandamus—Division Court—Amount—Jurisdiction—Abandoning excess of claim—Amendment at trial—Discretion.

General Rule 8 of the Division Courts provides that when the excess of a claim is abandoned to bring the amount within the jurisdiction, it must be done in the first instance on the claim.

Held, that there is nothing in this rule to prevent the Division Court Judge from permitting the plaintiff to amend his claim before or at the trial, upon such terms as he thinks fit; and General Rule 118 and s. 304 of the Division Courts Act afford ample authority for permitting such amendment; but the judge cannot be compelled by *mandamus* to exercise his discretion to permit an amendment.

Hands, for the plaintiff.

C. J. Holman, for the defendant.

ALPHA OIL CO. v. DONNELLY.

Writ of replevin—Direction of to sheriff who is liquidator of plaintiffs—Irregularity—Waiver—R. S. O. (1877) c. 53, s. 9.

In a replevin action the writ was directed to a sheriff who was the sole liquidator of the plaintiffs, and as such instituted the action.

Held, that this was at most an irregularity, and it was too late for the defendant to raise the objection after appearance.

R. S. O. (1877) c. 53, s. 9, applies to the case of an application on the merits and not for irregularity only.

Quære, whether, even if the objection had been taken in time, it should have prevailed, having regard to the kind of duty the sheriff has to perform in executing a writ of replevin, and to the position of the liquidator as a mere officer under the Act.

C. J. Holman, for the plaintiff.

Aylesworth, for the defendant.

[FALCONBRIDGE, J., 11TH JULY, 1888.

In re SOULES v. LITTLE.

Prohibition—Division Court—Defendant out of jurisdiction—Taking chances at trial—Delay in moving.

T., one of the defendants in a Division Court action, resided out of Ontario, and process was served substitutionally upon him. L., the other defendant, objected that the Court had no jurisdiction by reason of T.'s absence from the Province. No

written notice of this objection was given before the trial, and there was a conflict of evidence as to whether it was taken at the trial; but at any rate, if taken at all, it was practically abandoned, and the defence rested on a different ground. The trial was on the 13th January, 1888, when judgment went for the plaintiff for more than $100; a new trial was moved for by L., and was refused on the 23rd February, 1888; execution then issued, under which goods of L. were seized and became the subject of an interpleader. L. did not appeal, but on the 16th May, 1888, moved for prohibition.

Held, that, L. having taken his chances at the trial, and, not having sufficiently accounted for his delay in moving, the discretion of the Court should not be exercised in his favour.

W. T. Allan, for the motion.

C. J. Holman, contra.

[THE MASTER IN CHAMBERS, 3RD JULY, 1888.

MACDONELL v. SADDLEMYRE.

Divisions of Court—Action in Q. B. Division—Dismissal for default in not proceeding to trial at Chancery Sittings.

This was an action in the Queen's Bench Division. The pleadings were closed on the 25th February, 1888, and no notice for jury was given by either party. Cornwall was named as the place of trial; the Cornwall assizes were held on 20th March, 1888, and the Chancery Division Sittings on the 23rd April, 1888.

The defendant moved to dismiss the action for the plaintiff's default in not going down to trial at the Chancery Division Sittings, which began more than six weeks after the close of the pleadings.

Fullerton, for the motion.

W. H. Blake, contra, referred to *Palmateer* v. *Webb*, 7 C. L. T. Occ. N. 355.

THE MASTER IN CHAMBERS referred to *McDougall* v. *Patterson*, 7 C. B. 755, as to the meaning of the word "may" in Rule 590, and held that the plaintiff was in default for not proceeding to trial at the Chancery Division Sittings.

Order made dismissing action.

NORTH-WEST TERRITORIES

In the Supreme Court.

[MACLEOD, J., 20TH APRIL, 1888.

JACKSON v. ROTHWELL.

Costs, scale of—Clerk's fees—Sheriff's fees.

The plaintiff sued for $120 and recovered judgment for $75. On taxation of costs the clerk allowed him clerk's and sheriff's fees on the scale "from $100 to $200."

Held, on appeal that costs should be taxed, including clerk's fees and sheriff's fees, as if the plaintiff had originally sued for $75 only.

CHRISTIE v. MEAD.

Mechanic's lien—Possessory interest—Description of land.

An action to enforce a mechanic's lien. The defendant occupied as owner a house and lot of land in the village of Pincher Creek, described in the lien as follows: "A certain lot with the building thereon, being the building on which the work mentioned was done and materials furnished, and being 66 by 99 feet, and being situate in the village of Pincher Creek in said District, and being the lot and two-storey building thereon lying east of C. Kettle's private residence in said Pincher Creek, and being the second building west of the Methodist Church, and now occupied by said Mead, which lot is situate on the south-east quarter-section 22, township 6 range" etc., etc. There had been no survey of the quarter-section, and the patent had not issued. On the defendant's motion for a non-suit,

Held, that a mechanic's lien can be registered and enforced against a mere possessory interest; and that the description of the land was sufficient.

[31ST MAY, 1888.

CLIPSHAM v. MISSIONARY SOCIETY OF METHODIST CHURCH.

Solicitor and client—Authority of solicitor to settle action.

Action by a school teacher for three years' salary, $1,250. The defendants had previous to action tendered $312. A settlement was effected between the solicitors and counsel for the parties, whereby the plaintiff was to accept $312 and $26 costs, and give up all property of the defendants in his hands, and release all claims against them.

The plaintiff moved to set aside the settlement, on the grounds that the solicitor had exceeded his instructions in accepting a smaller sum than the amount claimed, and that the settlement covered matters collateral to the action.

Held, that the retainer of a solicitor implies authority to settle, unless against express instructions, or where there is fraud or concealment. In this case the settlement was an eminently fair one and would not be disturbed.

McFARLANE v. SHERAN.

Receiver—Ex parte motion.

A motion *ex parte* for a receiver before service of writ of summons was granted.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [10TH JANUARY, 1888.

TODD v. DUN, WIMAN, & CO.

Libel—Privileged communication—Mercantile agencies—Pleading—Variance.

In an action against a mercantile agency company the alleged libel consisted of the publication among the general body of the defendants' subscribers of a notice or circular containing the words, after the plaintiff's name, "If interested inquire at office." The defendants pleaded that the notice also contained words explanatory of the alleged libel, which should be read in connection therewith, and which had not been set out in the statement of claim. Upon this the plaintiff took issue.

At the trial it appeared that the circular contained not only the expression alleged in the statement of claim, but also a further statement referring to and explanatory of it.

The evidence was confined to the effect and meaning of the words set out in the statement of claim, notwithstanding the defendants' objection that they could not be severed from the rest of the circular. The plaintiff insisted that an amendment was unnecessary, and made no application to amend until the jury had retired.

Held, that there was a variance between the libel alleged and that proved, and that the plaintiff should have been non-suited.

A subscriber to a mercantile agency company applied to them for information as to the standing of a customer, and in order to furnish it they requested a local agent of theirs (the defendant C.) to advise them confidentially on the subject.

In an action by the customer against the local agent for an alleged libel consisting of the information given by him to the company in answer to their request;

Held, that the information having been procured for the purpose of being communicated to a person interested in making the inquiry, and there being nothing in the language in excess of what the defendants might fairly state, the communication was privileged; and there being no proof of express malice, the plaintiff was not entitled to recover.

It is the occasion of publishing the alleged libel which constitutes the privilege.

Where privilege exists, implied malice is negatived, and the burden of shewing express malice is on the plaintiff. The mere untruth of the statement, unless coupled with proof that the defendant knew that what he was stating was untrue, is not evidence of express malice.

Judgment of the Court below reversed; *Clark* v. *Molyneux*, 3 Q. B. D. 237; *McIntee* v. *McCulloch*, 2 E. & A. 390, referred to and followed.

Semble, *per* OSLER, J.A.—A mercantile agency company has no higher privilege for their business publication than other members of the community, and a general publication of libellous matter to all their subscribers indiscriminately is not privileged.

Osler, Q.C., *Lash*, Q.C., and *Alfred Macdougall*, for the appellants.

Ritchie, QC., and *McGillivray*, for the respondent.

BOYD, C.] [20TH APRIL, 1888.

CITY OF TORONTO v. TORONTO STREET RAILWAY COMPANY.

Municipal corporation—By-law—Ultra vires—Street railway company—Power of corporation to make regulations—Agreement, construction of.

In 1861 an agreement was entered into between the plaintiffs and certain persons for the construction and operation of street railways in the city of Toronto, by which the latter

agreed to construct the lines of road specified from time to time, and that they would at all times employ careful, sober, and civil agents, conductors, and drivers to take charge of the cars upon the said railways, and that they and their agents, conductors, drivers, and servants would at all times * * * operate the said railway and cause the same to be worked under such regulations as the common council of the city of Toronto might deem necessary and requisite for the protection of the persons and property of the public, and provided such regulations should not infringe upon the privilege granted by the agreement.

Subsequently the privileges so conferred upon those persons were assigned to the defendants, who continued to work the several railways, and after some years introduced for use thereon smaller cars drawn by one instead of two horses, as had been done previously, and with only one man in charge, instead of two, as on the larger cars.

In 1882 the council of the city passed a by-law prohibiting the operation of any car within the city limits without two men in charge, one as driver, the other as conductor. The defendants refused to conform to this by-law, and this action was brought to compel them to do so, the agreement of 1861 being relied on as warranting that relief.

Held, reversing the judgment of BOYD, C., (1) That the by-law in question was not within the terms of the agreement, its provisions not being aimed at the protection of the public; that term as used in the agreement not including passengers on the defendants' cars; and that it was therefore *ultra vires*; and

(2) That the by-law was also invalid as an invasion of the domestic concerns of the defendants.

McCarthy, Q.C., and *Shepley*, for the appellants.

Robinson, Q.C., *H. O'Brien*, and *Lefroy*, for the respondents.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 23RD JUNE, 1888.

HONSINGER v. LOVE.

Partnership—Judgment against partners — Payment by one — Enforcing against the other—R. S. O. (1887) c. 122, ss. 2, 3, 4—Partnership accounts—Statute of Limitations.

The plaintiff and defendant were partners, and judgment was recovered against them in 1876 by a bank upon certain promissory notes, of which they were respectively maker and indorser. The plaintiff paid the judgment immediately after its recovery, took an assignment of it, and in 1886 proceeded to enforce it against the defendant. The partnership accounts were taken by a referee, whose finding, approved by the Court, was that the defendant should have paid one-half of the judgment.

Held, that the plaintiff was entitled to that extent to stand in the place of the original judgment creditor, and enforce the judgment against the defendant.

Per ARMOUR, C.J.—The Mercantile Amendment Act, R. S. O. (1887) c. 122, ss. 2, 3, 4, applies to the case of partners. *Small* v. *Riddel*, 31 C. P. 373; *Potts* v. *Leask*, 36 U. C. R. 476; and *Scripture* v. *Gordon*, 7 P. R. 164, are to be disregarded, in view of the opinions of the Judges of the Court of Appeal in *London & Canadian L. & A. Co.* v. *Morphy*, 14 A. R. 577.

Per STREET, J.—It is not necessary to inquire whether the statute relates to partnership dealings; apart from it, the plaintiff is entitled, as surety for the defendant to the extent of one-half of the debt, to the benefit of the security, having made the payment with the intention of keeping the debt alive and not of extinguishing it, as shewn by his taking an assignment; and the fact that a trustee was not introduced is not material. *Prima facie* the defendant was under obligation to pay one-half of the judgment; it was therefore for his benefit that the partnership accounts were gone into; and he could not claim the benefit of the Statute of Limi-

tations; more especially as he submitted to have the accounts taken and did not raise the statute till after they had been taken.

G. C. Campbell, for the plaintiff.

Aylesworth, for the defendant.

CLARKE v. JOSELIN.

Rectification of contract—When ordered—Evidence—Exchange of mortgages—Liability of assignors.

In order to secure the rectification of an instrument the clearest evidence is required to be adduced: but the Court need not stay its hand because one of the parties to the instrument chooses to deny that there is any mistake in it. The writing must stand as embodying the true agreement between the parties until it is shewn beyond reasonable doubt that it does not.

If the Court, after considering all the circumstances surrounding the making of the instrument, whether it accords with what would reasonably and probably have been the agreement between the parties, gauging the credibility of the witnesses, paying due regard to their interest in the subject matter, and weighing their testimony, is satisfied beyond reasonable doubt that the instrument does not embody the true agreement between the parties, it should rectify it.

The transaction between the plaintiff and defendant was an exchange of mortgages. The plaintiff in assigning his mortgage to the defendant guarded himself against personal liability; but the defendant in assigning her mortgage did not do so, and the plaintiff sued her upon the covenant in her assignment that the mortgage assigned was a good and valid security, alleging that it was not so.

Held, upon the evidence, that the true agreement was that neither the plaintiff nor the defendant should be personally liable in respect of the mortgage which each assigned to the other; and rectification according to such agreement was adjudged.

S. R. Clarke, the plaintiff in person.

J. Reeve, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 28TH JUNE, 1888.

JOHNSON v. CLINE.

Fraudulent conveyance—To defeat, delay, and hinder creditors—Unable to pay debts in full—48 V. c. 26, s. 2.

E. C. having entered into a partnership, at the instigation of his wife, M. E. C., and family, conveyed certain land to her to prevent its becoming liable to any creditors of the new firm. He then as agent of his wife placed the same land in the hands of the plaintiff as a land agent to sell or exchange. Through the exertions of the plaintiff an agreement for exchange was arranged between the wife and one E. The plaintiff sued M. E. C. for his commission and recovered a verdict against her. M. E. C. reconveyed the land to the husband, E. C.

In an action to set aside the reconveyance as fraudulent and void against the creditors of M. E. C.,

Held, reversing the judgment of GALT, C.J., that the conveyance by the husband, E. C., to the wife, M. E. C., was made to defraud creditors; and following *Mundell* v. *Tinkis*, 6 O. R. 625, that the Court will not assist a person who has placed his property in the name of another in order to defraud his creditors; that M. E. C. had an interest in the property which could be made available to her creditors for the payment of her debts; and that the conveyance from M. E. C. was made with intent to defeat, delay, and prejudice creditors; and that as the evidence showed she was unable to pay her debts in full, it fell within the provisions of 48 V. c. 26, s. 2, and was void.

Moss, Q.C., and *Ritchie*, Q.C., for the plaintiffs.

Foster, Q.C., and *Meek*, for the defendants.

[ROBERTSON, J., 22ND MAY, 1888.

BALDWIN v. KINGSTONE.

Will — Devise — Heir-at-law — 14 & 15 V. c. 6 — C. S. U. C. c. 82—Moneys paid over six years—Moneys paid within six years under common mistake of law—Recovery of moneys which were the proceeds of lands vested by acts of the parties.

A. W. B. by his will, dated 14th August, 1850, after giving a life estate to his wife, provided as follows:—"After the death of my said wife I devise the lands * * known as 'Russell Hill' to my nephews, the Hon. R. B. and W. A. B., sons of my brother, the late Hon. W. W. B., deceased, their heirs and assigns forever, or in case of the death of them, or either of them, in my own lifetime, then I devise the share of such deceased to the heir-at-law or heirs-at-law of such deceased, his, her, or their heirs and assigns," and died 15th January, 1866, leaving W. A. B. and two sons and two daughters of the Hon. R. B., (who predeceased him), him surviving. One of the daughters died 10th July, 1866, unmarried and intestate, during the lifetime of the wife of A. W. B., the life tenant, who was in possession until her death, which happened on 19th April, 1870. On her death the two sons and surviving daughter entered into possession, collected rents, sold parts thereof, dividing the proceeds thereof in equal shares amongst themselves and partitioned part of the unsold balance thereof by deed dated 31st January, 1885, and in all respects dealt with the lands and the proceeds thereof as if they were all equally interested therein, their father, the Hon. R. B. having by his will divided his estate equally among them, until May, 1886, when the plaintiff, the eldest son of the Hon. R. B., was advised that he was entitled to the whole as "heir-at-law" of his father. In an action for the construction of the will and recovery back of the moneys paid over and the partitioned lands remaining unsold and the proceeds of those sold, and for a declaration that the plaintiff was solely entitled to the unpartitioned land,

Held, following *Tylee* v. *Deal*, 19 Gr. 601, that the Act 14 & 15 V. c. 6, C. S. U. C. c. 82, abolishing primogeniture, which came into force 1st January, 1852, does not apply except in cases of intestacy, and that the plaintiff was heir-at-

law, and that the several divisions of property and money did not come under the head of family arrangements; but

Held, also, that the moneys paid over more than six years before action could not be recovered; and, following *Rogers* v. *Ingham*, 3 Ch. D. 351, that as to the moneys paid over within six years an action for money had and received would not lie for moneys paid by one party to another under a mistake of law common to both when both had a full knowledge of all the facts.

Held, also, that moneys not paid over, being the proceeds of lately sold land, could not be recovered by the plaintiff, as the lands of which they were the proceeds had become vested in the different parties claiming them by possession as tenants in common and by the partition deed.

Robinson, Q.C., *J. Maclennan*, Q.C., and *Morris*, Q.C., for the plaintiff.

Irving, Q.C., *McCarthy*, Q.C., and *G. M. Evans*, for the defendants the trustees of Robert Baldwin's estate.

Moss, Q.C., and *W. Barwick*, for the defendant Ross.

[FALCONBRIDGE, J., 28TH AUGUST, 1888.

MACKENZIE v. CARTER.

Affidavits—Date of filing—Statement in notice of motion.

Upon a motion to commit the defendant the Court refused to allow the plaintiff to read affidavits filed upon a previous application, the date of their filing not having been stated in the notice of motion; and also refused to allow the plaintiffs to read an affidavit filed after the service of the notice.

Masten, for the plaintiffs.

Hoyles, for the defendant.

COMMON PLEAS DIVISION.

[IN BANC, 29TH JUNE, 1888.

REGINA v. TUCKER.

Canada Temperance Act—Conviction—Hard labour—Payment of inspector's attendance and mileage.

In a conviction under the Canada Temperance Act there is no power to order imprisonment at hard labour.

Quære, whether there is power to order the defendant to pay a sum for two days' attendance of the inspector and his mileage.

A. C. F. Boulton, for the defendant.

Aylesworth, for the complainant.

[THE DIVISIONAL COURT, 23RD DECEMBER, 1887.

WESTERN CANADA LOAN CO. v. GARRISON.

Statute of Limitations—Witnessing mortgage covering lands in question—Ignorance of lands included—Effect of—Estoppel.

In 1870 the defendant, under agreement therefor with his father, the owner of a farm, went into possession of a certain portion thereof, which pointed to the ownership in the defendant of the land, but whether by deed or will did not clearly appear, though apparently by the latter; and remained in possession for sixteen years. In 1876 the father executed a mortgage to the L. & C. Loan Co., which was witnessed by the defendant, who made the affidavit of execution on which the mortgage was registered. The defendant swore that he was not aware of the contents of the mortgage, nor that it included the portion of which he was in possession. In 1882 the father made a mortgage to the plaintiffs, also of the whole lot, and on default the plaintiffs brought an action to recover possession of the portion occupied by him.

Held, that the evidence shewed that the defendant had been in exclusive possession of the land occupied by him for the statutory period, so as to acquire a title thereto by possession; and that the fact of his being a witness to the mortgage to the L. & C. Co. and its subsequent registration, under the circumstances, did not by virtue of s. 78 of the Registry Act, R. S. O. (1877) c. 111, create an estoppel.

Lefroy, for the plaintiffs.

E. G. Porter, for the defendant.

[29TH JUNE, 1888.

LANGMAID v. MEIKLE.

Free grant lands—Pine timber—Right to—Estoppel.

In 1871 S., under the Free Grant and Homestead Act, located certain lands in the Crown Lands Department, but never entered into possession or performed the settlement duties. The lot was located through B., the Crown Lands agent for the district. In 1873 S. sold the timber on the lot to B. In 1875 B. wrote to the department asking if a cancellation and relocation would affect his title to the pine, and that it be relocated subject to his claim. The department replied that if the purchase was a *bona fide* one and in accordance with the order in council, a relocation would not affect his claim. The order in council was that the department would recognize the right of all purchasers or locatees of free grant lands who had purchased or located any lot on or before the 30th September, 1871, and who on that day were in actual occupation of or resident on the lots located, to sell and dispose of all pine trees on the said lots. On the 10th September, 1875, S.'s location was cancelled for non-performance of the settlement duties; and on the 3rd July, 1876, the lot was re-located to the plaintiff. The plaintiff was informed by B. of his purchase of the timber, and stated that he had a good title to it, which the plaintiff believed and acted on this belief. On the 9th November, 1876, the patent issued to the plaintiff, and contained no mention of the pine trees. In 1883 B. sold the timber to the defendant, who in October, 1886, cut some, notwithstanding he was notified by the plaintiff to desist. The timber was removed by the defendant after the issue of the patent. In an action by the plaintiff to recover the value of the timber,

Held, that as the patent contained no mention of the pine trees standing or being on the land, and as the land was located prior to 43 V. c. 4, the trees "remaining on the land" at the time of the patent, passed to the plaintiff; that prior to the issue of the patent, the locatee under R. S. O. c. 24, s. 10, had no right to cut timber except for building, fencing, and fuel, and in the actual clearing of the land for cultivation; nor was there any right under 37 V. c. 23, for the locatee was not on or before the 30th September, 1871,

"in actual occupation of or resident on the lots located;" and

Semble, that the words "remaining on the land" applied only to the trees not then cut; but it was not necessary to decide this point, for the plaintiff, being in possession with the assent of the Crown, had title to the timber as against the defendant, a wrongdoer.

Held, also, that the plaintiff was not estopped from bringing the action.

J. P. Mahaffy, for the plaintiff.

Delamere, for the defendant.

TYSON v. ABERCROMBIE.

Chattel mortgage—Consideration—Parol evidence to vary.

A chattel mortgage of certain timber was expressed to be given in consideration of the payment of $300 to the mortgagor; all the covenants and provisoes being applicable to a money payment or default therein. The mortgagor's father was indebted to the plaintiff, the mortgagee, for goods, and the father desiring to get more goods, the plaintiff delivered further goods to him, amounting in all to $300, on receiving the mortgage security. The defendant gave parol evidence to shew that prior to giving the chattel mortgage the mortgagor's father had sold the plaintiff the timber in question, which was cut off lands belonging to the son, the mortgagor; that at the time of the request for the further advance, a portion of the timber had been delivered to the plaintiff; that he declined to make the further advance unless the delivery of the balance of the timber was secured; and that the mortgage was given as security therefor and not to secure repayment of the $300; that such balance had since been delivered; and it was urged that the mortgage was therefore discharged.

Held, that the parol evidence was inadmissible.

Creasor, Q.C., for the plaintiff.

Masson, Q.C., for the defendant.

CLARK v. HARVEY.

Mortgage—Short Forms Act—Power of sale without notice—Validity under Act—Entry prior to sale.

The power of sale contained in a mortgage purporting to be under the Short Forms Act, was "Provided that the mortgagee on default for one day, may, without any notice, enter on and lease or sell said lands."

Held, per GALT, C. J., at the trial, that this case was distinguished from *Re Gilchrist and Island*, 11 O. R. 537, as the sale there was by an assignee of the mortgagee, and not, as here, by the mortgagee himself; that under the power entry on the land was not necessary prior to sale.

On appeal to a Divisional Court,

Held, per ROSE, J., that the power was operative under the Short Forms Act, and therefore the point as to entry was immaterial. *Re Gilchrist and Island* dissented from.

Per STREET, J.—The form was not operative; and the words therefore must be confined to their actual meaning apart from the statute; and that under its terms the power did not arise, or at all events could not be exercised until entry made on the land.

Osler, Q.C., and *Shepley*, for the plaintiff.

Moss, Q.C., *Bain*, Q.C., and *T. P. Galt*, for the defendants.

SWEENEY v. SWEENEY.

Maintenance, sum payable in lieu of—Payable at end of year—Consent judgment.

The plaintiff conveyed his farm to his son, subject to the payment of an annuity of $60 a year, and the plaintiff's "maintenance in board, washing, and keep out of the farm," or to "receive in cash an amount sufficient to pay for the same yearly." There was also a bond of even date whereby the defendant covenanted to furnish such maintenance or pay such sum. The defendant sold the farm and went to reside on a farm elsewhere. The plaintiff went and lived

with him on the new farm for some years, receiving his maintenance, etc., but, becoming dissatisfied, left.

Held, that the plaintiff was not bound to reside with the defendant wherever he might choose to go; and under the circumstances was entitled to be paid a reasonable sum for his maintenance, payable at the end of each year.

At the trial the defendant's counsel raised the objection that the amount, if any, was only payable at the end of the year. The learned Judge overruled the objection and decided that the plaintiff was entitled to receive $2 a week, payable weekly. The defendant's counsel then asked to have the amount payable monthly, to which the learned Judge acceded, and gave judgment accordingly.

Held, that the judgment could not be deemed to be by consent, so as to preclude the defendant from afterwards moving against it.

Leonard, for the plaintiff.

C. J. Holman, for the defendant.

GOWER v. LUSSE.

Malicious prosecution—Questions to jury—Judgment on specific findings—Waiver of right to general verdict.

By ss. 263-4 of the C. L. P. Act, R. S. O. (1877) c. 50, except in certain actions, including malicious prosecution, the Judge may require the jury to answer questions, and in such case the jury shall answer such questions, and shall not give any verdict; and by s. 252, the parties in person, or by their attorneys or counsel, may waive trial by jury.

In this case, which was malicious prosecution, the learned Judge, without objection, left certain questions to the jury, which they answered; but at the foot thereof wrote that their verdict was for the plaintiff. The learned Judge disregarded the general verdict, and entered judgment on the answers to the questions for the defendant.

Held, that the learned Judge acted properly; for the parties must be assumed to have waived their right to a

general verdict, and assented to the learned Judge entering judgment on the specific findings of fact; for if they can waive trial by jury altogether, there is no reason why they could not agree to the waiver as in this case.

The jury therefore in finding a general verdict were doing what it was agreed they should not do, and what the parties had dispensed with their doing.

Lynch-Staunton, for the plaintiff.

J. W. Nesbitt and *S. D. Biggar*, for the defendant.

POTTS v. BOVINE.

Will—Cujus est solum ejus est usque ad cælum—Rebuttable presumption—Occupation of adjoining occupant.

The maxim *cujus est solum ejus est usque ad cœlum* is not a presumption of law applicable in all cases and under all circumstances, but the presumption may be rebutted by circumstances existing at the date of the devise showing it was not to apply.

When therefore in a devise of land the boundaries according to the above maxim would include an edifice built upon a gangway or right of way, but the circumstances existing at the date of the devise shewed that it was not intended so to pass, but was to be part of an adjoining edifice, to which it was attached, and with which it was intended to be used and was used; it was

Held, to pass under the devise of such adjoining edifice, described, in addition to its metes and bounds, as occupied by its then occupant.

Dickson, Q.C., and *Burdett*, for the plaintiff.

Northrup, for the defendant.

STILLMAN v. AGRICULTURAL INSURANCE CO.

Insurance—Fire—Title—Fraud and false statement—1st and 15th statutory conditions—Threshing machine covered while in any outbuilding—Outbuildings insured in another company—Liability.

In an action on a fire insurance policy, application was made at the trial to set up the first statutory condition as a defence, in that a threshing machine insured as the plaintiff's

own property was partnership property; and also to set up the 15th condition in that there was fraud and false statement, for the like reason in the proofs of loss.

Held, that the application must be refused; the 1st condition having no reference to title, and as to the 15th the statement was not proved to be wilfully false and fraudulent, and the fact that the threshing machine was partnership property was not material, no question as to title having been asked. Persons in possession of goods may insure them to their full value, though not the actual owners.

The plaintiff had two barns, Nos. 1 and 2. The threshing machine was insured as "in No. 1 barn." The machine was in No 2. barn, though the horse power was outside. The plaintiff applied to the company, and an indorsement was made in the policy stating that the machine should be covered "while in any one of the out-buildings insured." Barn No. 2 was insured, though not by the defendant company.

Held, that the machine was covered by the policy, and that the plaintiff was entitled to recover in respect of it.

An objection was also made that a reaper destroyed by the fire was not covered by the policy.

Held, on the evidence, that the objection was untenable.

Pepler, for the plaintiff.

Kean, for the defendants.

BANK OF COMMERCE v. JENKINS.

Banks and banking—Composition and discharge—Execution of deed by local manager—Validity—Agreement to accept part of claim—Authority—R. S. O. c. 44, s. 53, s-s. 7.

At a meeting of the defendant's creditors, at which the plaintiffs were not represented, an agreement was made to accept 40 cents on the amount of the claims. A deed of composition, with a covenant to accept the 40 cents, was prepared and was executed by C. N., the manager of the plaintiffs' branch at L. The execution was "for Bank of Commerce, C. Nicholson"; opposite to which was an ordinary seal. At the time C. N. executed the deed there were

two creditors mentioned in the schedule who had not executed. On the 4th June, 1887, before either of these creditors had executed and before the composition notes had been tendered to C. N., he wrote to the defendant's solicitor withdrawing from the arrangement. The composition notes were subsequently tendered to C. N., but he refused to accept them. By the plaintiffs' Act of incorporation the management of their affairs was to be by the directors, who had authority to open branches and appoint the officers. The chief place of business was to be at T., where the corporate seal was kept.

Held, that the deed was not binding on the plaintiffs, not being under the corporate seal, nor under a signature or sign manual whereby they executed documents; and also the execution in question did not purport to be by the plaintiffs, but "for the bank"; apart, however, from the validity of the execution, C. N., on the evidence, had authority to agree to accept less than the whole of the claim, and did so agree, and the debtor performed his part by tendering the notes; and under R. S. O. (1887) c. 44, s. 53, s-s 7, the agreement was irrevocable.

Lash, Q.C., for the plaintiffs.

Aylesworth, for the defendant.

LYDEN v. McGEE.

False imprisonment—Reasonable and probable cause—Misdirection—Damages—Liability of corporation for act of agent.

Action of trespass for false imprisonment. The plaintiff was arrested, as was alleged, by direction of the defendant M., the treasurer of the defendant association. On being brought before the police magistrate the defendants did not appear to prosecute, when the police magistrate remanded the plaintiff, and subsequently dismissed the charge and discharged the plaintiff. At the trial the Judge charged the jury that it was not necessary to inquire whether or not the plaintiff was guilty of the crime charged against him, for by his acquittal he must be taken to have been not guilty, and the fact that M. believed him guilty was no excuse. If M.

had laid an information it would have been different, but not having done so, the only question was whether he gave the plaintiff into custody.

Held, misdirection; for the defendant M. was justified in ordering the plaintiff's arrest if a felony was committed, and he had reasonable and probable cause to suspect that the plaintiff committed the felony.

Held, also, that the defendants could only be liable for the damage proceeding from the arrest, and not for the subsequent proceedings.

A corporation may be liable for false imprisonment under an order of its agent acting within the scope of his authority.

Bigelow, for the plaintiff.

Lount, Q.C., and *McWilliams*, for the defendants.

NORTH BRITISH MERCANTILE INS. CO. v. KEAN.

Principal and surety—Notice terminating liability—Bond applicable to present and future appointment.

In June, 1884, K. applied to the plaintiffs to be appointed their agent at O., and was informed that he must secure sureties, whereupon he applied to the defendants, who agreed to act for him, and executed a bond, reciting that K. had been appointed agent of the company at O. The bond was sent to the head office at M., but nothing was done until December, 1885, when on K. writing to the head office he received a certificate appointing him agent. In September, 1884, in consequence of a disagreement between the defendants and K., they stated, they wrote notifying the head office that they repudiated their suretyship, and, receiving no answer, assumed that the matter was at an end. In an action against the defendants as sureties for K.'s default,

Held, that the defendants were discharged by the notice given terminating their suretyship, and that the weight of evidence shewed that both defendants had given notice and not one of them only, as found by the learned judge at the trial; but this was of no importance, for after the company had received notice from one of the sureties, they should

have notified the other surety, more especially as no appointment had then been made.

Per ROSE, J., also, that no appointment having been made when the bond was executed, the sureties could not be made liable for default made months after, even if they had received notice of the subsequent appointment; for they contracted in respect of a present appointment, and not a future one at some indefinite time, at the will of the company; but even if they could be made liable on notice, no such notice was given.

Pepler, for the plaintiffs.

Kean, for the defendants.

ROBINSON v. TOWN OF OWEN SOUND.

Building contract—Final certificate of engineer of completion of work—Necessity for—Condition precedent.

The plaintiff entered into a contract with the defendants for the construction of certain main sewers. The contract provided that the work and materials should in all things be performed and provided according to the plans and specifications, by a named date and to the entire satisfaction of the engineer in charge of the work. The specifications provided that the contractor should on the first day of each month hand in to the engineer his account for work during the preceding month, and be paid on the certificate of the engineer at the rate of 85 per cent. of work done during the previous month, an additional ten per cent. when the work was finished, and the balance of five per cent. at the expiration of three months from the date of the completion of the contract, etc. No final certificate was obtained from the engineer of the completion of the work, nor was the work completed to his satisfaction. In an action to recover the balance alleged to be due under the contract,

Held, that the certificate of the engineer as to the completion of the work was a condition precedent to the right to recover, and therefore the plaintiff must fail.

McCarthy, Q.C., and *Masson*, Q.C., for the plaintiff.

Lash, Q.C., and *Creasor*, Q.C., for the defendants.

IN CHAMBERS.

[ROBERTSON, J., 18TH JULY, 1888.

REGINA v. JONES.

Warrant of commitment—Indorsement by magistrate in another county.

The defendant was convicted by the police magistrate in and for the county of Brant, of a violation of the Indian Act, and fined $50 and costs. He was then, and had been for some years previously, a resident of the county of Haldimand.

The convicting magistrate, upon return made to a distress warrant, indorsed as provided by law, issued his warrant of commitment, of which the constable charged with its execution procured an indorsement by a justice of the peace for the county of Haldimand, in the form applicable to warrants for apprehension before trial, and he afterwards apprehended the defendant thereunder, and conveyed him to the common gaol at Brantford.

Held, that a warrant of commitment in execution, under the Summary Convictions Act, R. S. C. c. 178, cannot be backed by a justice of the peace of another county; and the constable having acquired and possessing no authority to execute it in the foreign jurisdiction, the arrest and detention thereunder were illegal, and the defendant was ordered to be discharged.

Mackenzie, Q.C., for the defendant.
D. Armour, for the magistrate.

[MACMAHON, J., 10TH AUGUST, 1888.

LEITCH v. GRAND TRUNK RAILWAY CO.

Discovery—Examination of officer of corporation—R. S. O. (1877) c. 50, s. 156—Ex parte order—Railway conductor—Discovery before second trial from witness examined at first trial.

An order for the examination of a person as an officer of a corporation, under R. S. O. (1877) c. 50, s. 156, is properly made *ex parte*.

The conductor of a train on which the plaintiff was a passenger when the accident out of which the action arose occurred,

Held, examinable as an officer of the railway company under such section.

A person who is called as a witness at the first trial of an action and cross-examined can not again be examined, under such section, for discovery before a second trial.

Rae, for the plaintiff.

Hoyles, for the defendants.

[THE MASTER IN CHAMBERS, 20TH AUGUST, 1888.

CARTER v. GRASETT.

Discovery—Examination of witness before new trial—Rule 285.

Before going down to a second trial directed by the Court of Appeal on the 10th January, 1888, (14 A. R. 685, *ante* p. 182) the plaintiff applied for leave to examine Doctor Temple, the defendant's predecessor in title, for discovery.

George Bell, for the motion.

D. T. Symons, contra.

THE MASTER IN CHAMBERS.—The pleadings have been substantially complete for some years and the litigation has been going on for eight years. The facts during that time have been much discussed, and the plaintiff has not made any endeavour either in the former trial or for this trial to examine Doctor Temple until now.

I can imagine that it should be looked upon as an advantage by the plaintiff to examine Doctor Temple before the trial, but I think it is not a case within Rule 285, because I cannot see any reason for it that would not apply in pretty much all cases where facts were largely in contest. In most such cases it would be an advantage to a party to be at liberty to examine at leisure the principal witnesses on the opposite side, especially that the exact evidence they could give might be more carefully considered.

I do not think a case for discovery in the proper sense is made out. The plaintiff knows all the facts and the power of examining the principal witnesses with deliberation is not just what Rule 285 is thought to be intended for.

Application dismissed with costs to the defendants in any event.

County Judge's Criminal Court, Brant.

[JONES, Co. J., 7TH JUNE, 1888.

REGINA v. JOHNSON.

Criminal law—Larceny—Cutting wood on Indian reserve—Possession of accused—Offence against Indian Act—Property in Crown.

The prisoner, an Indian, was indicted for larceny for removing wood from an Indian reserve, the property in the wood being laid in one Garlow, another Indian resident on the reserve.

It appeared in evidence that at the time of the commission of the alleged offence the land from which the wood was stated to have been taken was leased by Garlow, the prosecutor, to a woman named Hill, who lived with the defendant as his wife, under the sanction of a prevalent Indian custom. No secrecy was practised in taking the wood.

Held, that there can be no indictment of an Indian for larceny for cutting and removing wood from an Indian reserve, from land of which he is in possession ; but recourse must be had to the summary prosecution for offences of this description provided by ss. 26, 27, and 28 of the Indian Act, R. S. C. c. 43.

Semble, that the property in the wood was improperly laid in the prosecutor ; it should have been laid in the Crown.

Van Norman, Q.C., for the Crown.
Mackenzie, Q.C., for the defendant.

Fifth Division Court, Northumberland and Durham.

[KETCHUM, JUN. CO. J., 28TH JULY, 1888.

KERR v. RICKARD.

Alimony suit—Failure to obtain judgment—Costs.

Action brought by J. W. Kerr, solicitor for Mrs. Heard in an alimony suit, *Heard* v. *Heard*, against the executor of her late husband for the amount of his bill in the alimony action, where the plaintiff did not obtain a judgment owing to her husband's death during the pendency of the action, as for necessaries supplied to Mrs. Heard.

Held, that R. S. O. (1877) c. 40, s. 48—"In no suit for alimony in which the plaintiff fails to obtain a decree for alimony shall any costs be decreed to be paid by the defendant beyond the amount of the cash disbursements properly made by the plaintiff's solicitor"—does not apply when a distinct and substantive action is brought by the plaintiff's solicitor for his costs as for necessaries supplied to the wife. In such case the law stands as before the Act, and the solicitor is entitled to recover full costs against the husband, or his executor, as for necessaries supplied to the wife, if they are necessaries.

J. W. Kerr, plaintiff in person.

W. R. Riddell, for the defendant.

NEW BRUNSWICK.

In the Supreme Court.

MARITIME BANK OF CANADA v. ROBINSON.

Bank—Winding-up—R. S. C. c. 129—Action by liquidator against debtor—Right of set-off—Claims purchased by debtor before and after presentation of petition for winding-up—Payment of debts due to the bank with their own notes.

A debtor of a bank which is being wound up under the Winding-up Act, R. S. C. c. 129, is entitled to set off against a debt due by him to the bank prior to the commencement of the winding-up proceedings, a liability of the bank acquired by him before the presentation of the petition for the winding-up, even though acquired by him for that purpose after the bank had suspended payment, and with a knowledge of that fact; but such right of set-off does not exist in respect to claims acquired after the presentation of the petition for the winding-up.

The liquidators of a bank are not bound to accept in payment of a debt, notes issued by the bank, and acquired by the debtor for that purpose after the commencement of the winding-up.

STEPHENSON v. FRASER.

New trial—Staying proceedings till payment of costs of appeal to Supreme Court of Canada.

Where a new trial of a case in this Court is ordered by the Supreme Court of Canada, such trial will not be stayed till the costs of the appeal are paid.

DAVIS v. ISAACS.

Statute of Limitations—Promissory note made in foreign country—Where defendant removes into this Province after note becomes due—Right of action within six years thereafter.

A promissory note was made in a foreign country, where both the maker and payee resided, and where, by law, a suit to recover the amount must be brought within six years after the cause of action accrued. After the note fell due, the maker came to reside in this province.

Held, that by the Statute of Limitations, Consol. Statutes c. 85, s. 11, the payee's right of action was saved for six years thereafter, though his remedy was barred by the law of the country where the note was made.

MAIN v. TOWN OF ST. STEPHEN.

Municipal corporation—By-law—Directing arrest without warrant—Policeman—Liability of town for arrest by, where policeman acted through malice.

The Act 34 V. c. 20, amended by 35 V. c. 21, authorized the town of St. Stephen to make by-laws (*inter alia*) for the good government of the town; to appoint a police force; to preserve peace and good order; and to restrain and punish vagrants and drunkards. The town council made a by-law directing any constable or peace officer to preserve the public peace, and to prevent disorders in the town, and to arrest without warrant, any person found committing any offence punishable by indictment or summary conviction, or who should be found drunk, or causing a disturbance in the streets, and forthwith to take such person before the police magistrate. The plaintiff was arrested by a policeman for being drunk and disorderly in the street in the evening, and imprisoned till the next morning. In an action against the town for false imprisonment, the plaintiff swore that he was not drunk, and that the policeman was actuated by malice in arresting him, both of which facts were denied by the policeman. The jury found that the plaintiff was not drunk and did not create a disturbance at the time, and that the policeman acted maliciously.

Held, 1. That the by-law was invalid in authorizing the arrest in such a case without a warrant, and that the town would therefore be liable for the act of the policeman in so arresting a person.

2. That the by-law having authorized policemen to arrest persons drunk upon the streets, necessarily gave them authority to determine whether a person arrested on that ground was drunk; and if they made the arrest, *bona fide* believing that fact, the town council would be liable; but

3. (PALMER, J., dissenting), the jury having found that the plaintiff was not drunk or disorderly, and that the policeman was actuated by malice in making the arrest, the defendants were not liable for his act, the inference from such finding being that he did not *bona fide* believe in the existence of the facts which would authorize an arrest under the by-law.

In re RAND.

Costs—Appeal to the Supreme Court of Canada—Taxation and recovery of costs of appeal.

Under section 46 of "The Supreme and Exchequer Courts Act," the costs of an appeal to the Supreme Court of Canada may be taxed by the Clerk of this Court, and recovered by execution issued out of this Court.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

C. P. D.] [8TH MAY, 1888.

MEADE v. O'KEEFE.

Partnership—Dissolution—Good will—Reference.

J. H. M. entered into partnership with the defendants in the business of maltsters and brewers, he and the defendant H. each paying to the defendant O'K. $12,500 for his good will in the business.

One of the stipulations in the partnership articles was (No. 3) to the effect that any of the partners improperly dealing with the moneys or assets of the partnership should be liable to expulsion from the firm by a simple notice from the others or other of them to the effect that the partnership was at an end, in which case the partner so acting improperly should not have any claim for good will in the partnership.

It was clearly shewn that J. H. M., during the period which the partnership had been in existence, had been in the habit of lending the funds of the firm to his friends, and otherwise so improperly dealing therewith as to have fully justified his partners in giving notice expelling him from the partnership. Instead of doing so, however, they verbally notified him that their partnership must cease, and then with him signed a notice, which was duly published, that the partnership was dissolved by mutual consent.

J. H. M. at the same time executed a transfer of all his interest in the partnership to his mother, the plaintiff, and she sued for the price paid by him to O'K. for the good will.

An appeal from the judgment of the Common Pleas Division, 15 O. R. 84, holding the plaintiff entitled to recover the sum so paid, was, owing to an equal division of the Judges of this Court, dismissed with costs.

HAGARTY, C.J.O., and OSLER, J.A., while agreeing with the other members of the Court that the dissolution had not been effected by the expulsion of J. H. M. under the 3rd clause, were of opinion that the most the plaintiff was entitled to was a reference to inquire what was the value of the good will of J. H. M. in the partnership.

Robinson, Q.C., and *Moss*, Q.C., for the appellant.

J. Maclennan, Q.C., and *Worrell*, for the respondent.

ROSE J.] [14TH SEPTEMBER, 1888.

ROGERS v. WILSON.

Mortgagor and mortgagee—Assignment of mortgage to third person—49 V. c. 20, s. 7.

The decision of ROSE, J., 12 P. R. 322; 7 C. L. T. Occ. N. 399; 8 C. L. T. Occ. N. 3, affirmed.

C. C. Robinson, for the appellant.

A. M. Taylor, for the respondent.

IN CHAMBERS.

[OSLER, J.A., 13TH SEPTEMBER, 1888.

O'SULLIVAN v. LAKE.

Parties—Appeal—Relief over.

The plaintiff served notice of appeal from the judgment of the Common Pleas Division, 15 O. R. 544; 8 C. L. T. Occ. N. 288, upon both defendants and furnished both with security for costs of appeal, but disclaimed any relief against the defendant B., and brought him before the Court only that the defendant L. might obtain any relief over against B. that he

might consider himself entitled to. L. claimed no relief against B. in his pleadings or reasons of appeal.

Held, that B. was not a person who would or might be affected by a reversal of the decision complained of, and there was no reason for retaining him before the Court.

F. A. Anglin, for the plaintiff.

Aylesworth, for the defendant Balfour.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[In Banc, 16th January, 1888.

In re HALDIMAND DOMINION ELECTION PETITION.

Elections—Service of petition—Order for substitutional service—When to be made—Order fixing time of trial—Jurisdiction as to—Court or Judge.

The effect of s. 10 of R. S. C. c. 9 is that an order, made within the first five days after an election petition has been filed, allowing a petitioner to effect service in any manner other than that intended by the first part of the section, is beyond the power of the Court or a Judge, so far as this section is concerned.

Under an order made within the five days a petition was served upon the wife of the respondent at his domicile at the village of D.

Held, that, as service on the respondent "either personally or at his domicile" was good service within the meaning of the section, no order was necessary, and the fact that the service in this case was made under an order did not make it any the less a good service.

Held, also, that an order fixing the time for the trial of the petition might be made by the three Judges of a Division of the High Court sitting together, or by one of them sitting alone, and that it was in their discretion to dispense with

notice of the application under the circumstances in this case.

Semble, a Judge making such an order need not necessarily be sitting formally in single Court.

McCarthy, Q.C., and *W. M. Douglas*, for the motion.
Aylesworth, contra.

[ARMOUR, C.J., 20TH SEPTEMBER, 1888.

In re ONTARIO TANNERS' SUPPLIES CO. AND ONTARIO AND QUEBEC R. W. CO.

Railway Company—Expropriation of land—Notice—Time—51 V. c. 29 s. 164 (D.)

In the computation of the ten days' previous notice necessary to be given under 51 V. c. 29, s. 164, (D.), to obtain a warrant for the possession of land by a Railway Company, the day of the service of the notice and the day of the return must both be excluded.

MacMurchy, for the Railway Company.
Stephen M. Jarvis, contra.

[21ST SEPTEMBER, 1888.

WATERHOUSE v. McVEIGH.

Arrest—Order for ca. sa.—Powers of County Court Judge—Power of Judge in Court to rescind order.

The Judge of a County Court has no power, either as such Judge or as local Judge of the High Court, to order the issue of a *ca. sa.* in an action in the High Court.

Cochrane Mfg. Co. v. *Lamon*, 11 P. R. 351, followed.

A Judge of the High Court, sitting in Court, has power to set aside an order of a County Judge for a *ca. sa.*

J. A. McCarthy, for the plaintiff.
Hewson and *Plaxton*, for the defendant.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 6TH SEPTEMBER, 1888.

CUERRIER v. WHITE.

Costs—Taxation—Appeal—Local taxing officers—Form of certificate or allocatur.

There is no need for local officers when taxing costs for the purpose of completing a judgment and issuing execution thereon (which they as local officers may also do) to preface the issuing of an execution by a formal certificate to themselves of what they have done upon the taxation. They signify clearly and sufficiently the completion of the taxation and the full discharge of their functions as taxing officers when they add up results, ascertain the correct amount payable, note the bill of costs as taxed at such a sum, with the date, and verify the whole by their signature, which is a sufficient certificate or allocatur to shew that the taxation is at an end. They have no power to alter what they have allowed or disallowed after this, except as to clerical errors, and they are then *functi officiis*.

Remarks upon the former practice at law and equity as to allocaturs and certificates of taxation.

Hoyles, for the plaintiff.

C. J. Holman, for the defendant.

[BOYD C., 14TH SEPTEMBER, 1888.

CAFFERY v. ST. CATHARINES AND NIAGARA CENTRAL R. W. CO.

Appeal—Award—Ontario Railway Act—Time—Notice of making award.

This was an appeal by the defendants from an award under the Ontario Railway Act, R.S.O. (1887) c. 170. S. 20, s-s. 20, of this Act says that "any party to the arbitration may, within one month after receiving a written notice from one of the arbitrators of the making of the award, appeal therefrom" etc. In this case notice of appeal was not given by the defendants till after the lapse of a month from service upon them by the plaintiff of a copy of the award.

2. If the original order is not shewn at the time of service of a copy, the person served cannot be brought into contempt for disobedience to it.

Meyers v. *Kendrick*, 9 P. R. at p. 366, followed.

3. A chattel mortgage is a transfer of property and effects within the meaning of 49 V. c. 16, s. 12.

4. A transferee was allowed to appeal from an order for his examination, after the time for appealing had expired, his delay being satisfactorily explained.

James Parkes, for the judgment creditor.

Masten, for the transferee.

IN CHAMBERS.

[BOYD, C., 10TH SEPTEMBER, 1888.

HAY v. JOHNSTON.

Judgment—Summary order for, upon money demand—Leave to proceed upon another claim—Rule 739.

A motion by the plaintiff for judgment under Rule 739 (formerly Rule 80) referred to a judge by the Master in Chambers.

The writ of summons was indorsed to recover the amount of a bill of exchange, and also to set aside a conveyance as fraudulent.

Hoyles, for the motion, cited *Huffman* v. *Doner*, 12 P. R. 402, and *Bissett* v. *Jones*, 32 Ch. D. 635.

No one contra.

BOYD, C., held, following the principle of his own decision in *Huffman* v. *Doner*, in preference to the express decision of FERGUSON, J., in *Standard Bank* v. *Wills*, 10 P. R. 159, that there might be two judgments in the action; and therefore made the order for judgment under Rule 739, upon the money demand, with leave to the plaintiff to proceed upon his other claim.

[17TH SEPTEMBER, 1888.

In re McKEEN AND TOWNSHIP OF SOUTH GOWER.

Costs—Increased counsel fees—Arbitration—Powers of taxing officer.

Item 153 of Tariff A, Con. Rules of Practice, should be read as part of item 164; and the Taxing Officers at Toronto have authority to consider the question of increased counsel fees in the case of an arbitration, where there is no cause in Court, and a reference to a local officer to tax costs has been made under R. S. O. (1887) c. 53, s. 24.

Middleton, for McKeen.

[19TH SEPTEMBER, 1888.

DONEGAN v. SHORT.

Arrest—Ca. re.—Breach of promise—Statement of damage—Corroboration—Discharge of defendant.

In an action for breach of promise of marriage the defendant was arrested under a *ca. re.*, the order for which was granted upon an affidavit which did not swear to any amount of damage. Upon a motion to discharge the defendant from the custody of his bail, he denied the promise of marriage, and the plaintiff filed no affidavit corroborating her own. The intent of the defendant to leave the country rested on alleged admissions made by the defendant to the plaintiff, which he denied, and he also brought forward a strong fact against his likelihood to abscond from the Province.

Held, that under these circumstances the defendant should be discharged and the bail bond delivered up to be cancelled.

Middleton, for the plaintiff.

W. M. Douglas, for the defendant.

[ARMOUR, C.J., 25TH SEPTEMBER, 1888.

HOFFMAN v. NEWELL.

Counter-claim for slander—Action of assault.

Appeal by the plaintiff from an order of the local Judge at St. Thomas refusing to strike out the defendant's counter-claim.

The action was for assault, and the counter-claim for slander, alleging that the plaintiff had accused the defendant of stealing a set of harness.

W. H. Wallbridge, for the plaintiff, referred to *McLean* v. *Hamilton Street R. W. Co.*, 11 P. R. 193; *Central Bank* v. *Osborne*, 12 P. R. 160; and cases therein cited.

W. H. P. Clement, for the defendant, was not called upon.

ARMOUR, C.J., said that if the assault case were tried alone the evidence would, no doubt, bring out the circumstances giving rise to the slander. The two were cognate cases, both arising from injured feelings, and it was most convenient that they should be tried together. Convenience in trial was the test.

Appeal dismissed with costs.

[25TH SEPTEMBER, 1888.

BRODERICK v. BROATCH.

Notice of trial—Service of before defence filed—Irregularity.

Where the statement of defence was filed on the last day for giving notice of trial for the Belleville Assizes, and a joinder of issue and jury notice were filed on the same day but *after* the filing of the defence.

Held, that the service of notice of trial with the joinder and jury notice, on the same day, ***before*** the filing of the defence, was not an irregularity.

Mahoney, for the plaintiff.

C. J. Holman, for the defendant.

[FERGUSON, J., 26TH SEPTEMBER, 1888.

EDWARDS v. EDWARDS.

Costs, security for—Garnishing matter—Evidence of residence out of jurisdiction.

In an issue between a judgment creditor and a garnishee as to the liability of the latter to the judgment debtor,

Held, that there was power to order security for costs; but

Held, that the refusal of the solicitor for the judgment creditor to disclose his client's place of abode was not sufficient evidence of his living out of the jurisdiction to support an order for security for costs.

E. R. Cameron, for the judgment creditor.

Shepley, for the garnishee.

[ROSE, J., 21st SEPTEMBER, 1888.

COLTER v. McPHERSON.

Discovery—Malicious prosecution—Investigation of dealings between the plaintiff and a third person.

The statement of claim set out two causes of action.

1. Falsely and maliciously and without reasonable and probable cause preferring a charge of perjury.

2. Falsely, etc., preferring a charge of obtaining a valuable security by false pretences.

The defence averred that the plaintiff and one Jones conspired together to obtain two promissory notes from the defendant by false pretences; that the plaintiff first visited the defendant and by fraud and falsehood induced him to enter into a contract to purchase certain hay forks, and that Jones followed him in course of time in pursuance of their fraudulent scheme, and by fraud and falsehood and false pretences obtained the notes.

Held, that upon examination of the plaintiff for discovery the defendant should be permitted to inquire into the dealings between the plaintiff and Jones fully and freely, to ascer-

tain whether Jones and the plaintiff were acting in concert, and whether any false pretence made by Jones was in fact a false pretence by the plaintiff, and for this purpose might investigate all sales of forks made by the plaintiff or Jones, or either of them, under any agreement or arrangement, and the history of all notes received in carrying out such sales, and of all entries in the plaintiff's bill books and all other books relating to such transactions.

Osler, Q.C., for the plaintiff.

Ermatinger, Q.C., for the defendant.

[MACMAHON, J., 30TH AUGUST, 1888.

REGINA v. COX.

Criminal law—Larceny Act, R. S. C. c. 164—Information—Habeas corpus during remand on preliminary investigation—Bail—R. S. C. c. 174, s. 83.

The information charged that the prisoner at a named time and place "being a trustee of a sum of money * * * the property of the C. B. of C. (a corporate body) for the use of the said the C. B. of C., did unlawfully and with intent to defraud, convert and appropriate the same to his own use, contrary to the statute in that behalf."

Held, that the prisoner was by this information charged with a criminal offence under the Larceny Act, R. S. C. c. 164.

Held, also that a writ of *habeas corpus* should not issue where the accused is in custody pending a preliminary investigation before a magistrate, during a remand to enable the prosecution to supply evidence in support of the charge.

Held, lastly, that a Judge of the High Court has power under s. 83 of the Criminal Procedure Act, R. S. C. c. 174, to admit to bail in cases where the accused has not been finally committed for trial if he "think it right so to do"; but in this case, the charge being a serious one, the magistrate before whom the prisoner appeared having refused to admit him to bail, and no depositions having been taken, an order for bail was refused.

Badgerow, for the Crown.

Murdoch and *A. C. Galt*, for the prisoner.

[THE MASTER IN CHAMBERS, 14TH SEPTEMBER, 1888.

OLDFIELD v. BARBOUR.

Mechanics' lien—One lien against two owners—Joinder of parties—Summary application in action.

Four mechanics worked with a contractor for wages upon two buildings, owned by different persons, and each registered a lien for his services on both the buildings, against the contractor and against both the properties on which they worked, and against both the owners, each lien being for the amount of the whole wages claimed in respect of services as to both properties. All four joined in one action against the contractor and the two owners to enforce their liens.

Upon a summary application by the contractor the mechanics' liens and writ of summons were set aside.

Allan McNab, for the plaintiffs.

W. Davidson, for the defendant Barbour.

NEW BRUNSWICK.

In the Supreme Court.

In re THE TOWN OF WOODSTOCK.

Municipal corporation—Town and parish of Woodstock—Dispute as to distribution of paupers—49 V. c. 16—Jurisdiction of County Court Judge as arbitrator—Consent of counsel—Estoppel.

The support of the poor in the town and parish of Woodstock was, by Consol. Statutes, c. 101, s. 25, vested in a board of supervision composed of the Mayor and Town Councillors of Woodstock, and of the Municipal Councillors for the parish of Woodstock. By Act 49 V. c. 16, (which for all municipal purposes, except the support of the poor, came into operation on the 1st October, 1886, and so far as related to the poor, on the 1st December) the town of Woodstock was

separated from the parish for the purpose of the support of the poor, and the power and authority of the board of supervision was, so far as related to the town of Woodstock, vested in the Town Council, and the paupers in the almshouse were to be supported by the town and parish respectively, according to a distribution to be agreed upon; and in case of disagreement or dispute as to such distribution, it was to be decided by the Judge of the County Court. In November, 1885, the Mayor of Woodstock called a meeting of the board of supervision, to be held on the 1st December, for the purpose of distributing the paupers between the town and parish. The meeting was attended by three Councillors of the town and two Councillors elected for the parish for the year 1885 —the Councillors elected for the parish in October, 1886, not being allowed to take part in the proceedings: a distribution of the paupers was made, notice of which was given to the overseers of the poor of the parish, who refused to recognize the proceedings. The Mayor then applied to the Judge of the County Court to settle the dispute, who, after hearing the parties, refused to make any order, considering that he had no jurisdiction in the matter, although the Councillors for the parish admitted that he had authority to act.

Held, per ALLEN, C.J., FRASER and TUCK, JJ., (PALMER, J., dissenting) 1. That the powers of the board of supervision ceased when the Act 49 V. c. 16 came into force; that the meeting called by the Mayor had no jurisdiction to make any distribution of the paupers; and, therefore, that no state of facts existed to give the Judge jurisdiction to make an order.

2. That the admission made to the Judge by the parish Councillors that a dispute had arisen between the town and parish respecting the paupers, did not give him authority to make an order, or estop the parish from afterwards objecting that he had no jurisdiction.

Per PALMER J., that when the authorities for the town and parish admitted before the Judge that there was a disagreement about the distribution of the paupers, and the facts were shewn to him, he had authority to decide the matter.

In re LAWLOR.

Judgment debtor—Examination—Consol. Statutes c. 38—Conduct money—Jurisdiction of Commissioner—Attachment for contempt.

A county Court has no authority under Consol. Statutes c. 38, s. 22, to issue an attachment against a debtor for neglecting to attend before a Commissioner for examination, unless the judgment against the debtor was recovered in the Court from which the attachment issued.

Quære, 1st. Whether a Commissioner has any power to summon a debtor before him for examination, unless the debtor resides in the County for which the Commissioner was appointed.

2nd. Whether a debtor summoned to appear before a Commissioner for examination is guilty of contempt for not appearing, unless conduct money is tendered to him.

BARSS v. MERCHANTS' MARINE INSURANCE CO.

Insurance—Marine—Variance between application and policy—Interests insured—Notice of abandonment—To whom freight belongs after abandonment.

The plaintiffs, B. & Co., being owners of four shares of a ship, which were registered in the name of one of them, who was also the registered owner of other four shares, as trustee, and having also authority to insure the interest of two other joint owners of twelve shares of the ship, intending to insure these several interests, instructed H. V., the managing owner of the ship, by telegram to effect insurance on their account. H. V. made a written application to the defendants stating that the insurance was wanted by the plaintiffs on account of themselves, and signed it "B. & Co., per H. V." The policy issued was "on account of whom it may concern." The ship having been injured on a voyage from St. John to Rio Janeiro, succeeded in reaching Rio on the 18th February, 1884, and on the 7th April following, H. V. gave the defendants the following notice of abandonment: "I hereby abandon to you all my right, title, and interest in the vessel

(naming her) insured by you under policy No. 6938, and hereby claim total loss thereon on behalf of Messrs. B. & Co. as their agent.

H. V., Agent for B. & Co."

Held, 1. Per PALMER and FRASER, JJ., (WETMORE, J., dissenting), that the rights of the parties must be governed by the policy issued, and not by the application, and therefore that the interest in the whole twenty shares which the plaintiffs had a right to insure, and intended to insure, was covered by the policy.

2. That the plaintiffs having authority to insure the twelve shares, had *prima facie* a right to abandon them.

3. That the notice of abandonment was sufficient, and applied to the whole twenty shares.

4. Per *totam curiam*, that the defendants by the abandonment would be entitled to receive a portion of the freight earned after the damage to the ship, if there had been evidence of the amount received by the plaintiffs.

In re DONAGHUE.

Canada Temperance Act—Revised Statutes of Canada—Effect of as repealing the Acts consolidated.

The Revised Statutes of Canada do not operate as new laws, but as a substitution and consolidation of the Acts thereby repealed; therefore those statutes do not affect the operation of the Canada Temperance Act where it has been previously adopted.

FERGUSON v. AMOS.

Writ of execution—Alteration of after delivery to sheriff—Setting aside.

If a writ of *fieri facias* is altered in the teste and return day after delivery of it to the sheriff, and has not been resealed, it will be set aside.

ROBERTS v. TRUSTEES OF SCHOOL DISTRICT NO. 6, PARISH OF SHEDIAC.

Notice of action—Service on Secretary of School Board.

A notice of action against School Trustees in their corporate capacity may be served on their secretary.

MANITOBA.

IN THE QUEEN'S BENCH.

[FULL COURT.

GERRIE v. CHESTER.

Appeal from County Court—Security by payment into Court.

This was an appeal from a County Court. Upon opening of the appeal it was objected that no bond for security for the costs of the appeal had been given. It appeared, however, that security had been given by payment of money into Court. The judgment of the Court was given by

KILLAM, J.,—(after an examination of the statutes, Con. Stat. c. 34, ss. 226, 227, 228; 47 V. c. 22, s. 23; and 50 V. c. 9, ss. 243, 244, 245.)—In my opinion where the necessary sum has been paid into Court, or other security given with the sanction of the County Judge, and he has certified the case to this Court, the giving of a bond is not under the present Act a condition precedent to the hearing of the appeal, and as it is admitted that the money has been paid into Court with such sanction in this case, the hearing of the appeal should be proceeded with.

WATERS v. BELLAMY.

Husband and wife—Breach of promise of marriage—Corroborative evidence.

The corroboration necessary in an action for breach of promise need not go the length of, by itself, proving the promise; it will be sufficient if it supports the plaintiff's evidence in respect of the promise, so as to make it appear reasonably probable that her testimony, that the promise was given, is true.

Circumstances which are as consistent with the non-existence of a promise as they are with the fact of a promise having been given, can scarcely be taken to afford the material corroboration that the statute requires.

[But see *Yarwood* v. *Hart*, *ante*, p. 296.—ED.]

CANADIAN BANK OF COMMERCE v. NORTHWOOD.

Counter-claim or set-off arising out of jurisdiction.

Held, that a defendant can only set up by way of counter-claim or set-off a demand for which he can bring an action.

Therefore, a cause of action which arose out of the jurisdiction cannot be set up by way of counter-claim or set-off, unless the circumstances be such as to permit of an action being brought upon it.

The following authorities were referred to by the Court: *Birmingham Estates* v. *Smith*, 13 Ch. D. 506; *Stook* v. *Taylor*, 5 Q. B. D. 575; *McGowan* v. *Middleton*, 11 Q. B. D. 324; *Winterfield* v. *Bradnum*, 3 Q. B. D. 324; *Sykes* v. *Sacerdoti*, 15 Q. B. D. 423; *Chapple* v. *Durshu*, 1 C. & I. 1; *Francis* v. *Dodsworth*, 4 C. B. 219; *Rawley* v. *Rawley*, 1 Q. B. D. 460; *Waterman* on Set-off, p. 24; *Leake* on Contracts, p. 1003; and the Statutes of Set-off, 2 Geo. 2 c. 22, and 8 Geo. 2 c. 24.

[KILLAM, J.

WOODS v. TEES.

Pleading—Striking out embarrassing pleas.

A false plea cannot be assumed to have been filed for embarrassment or delay if there be other valid pleas upon the record.

The rule as to striking out embarrassing pleas applies to affirmative pleas. It is not necessarily unreasonable that a defendant should put a plaintiff to the proof of his case.

Upon a motion to strike out a plea, although the plaintiff give *prima facie* evidence of its falsity, the defendant is not bound to swear to its truth in order that it may not be struck out.

Although there be direct Manitoba authority against the validity of a defence, the plea will not, merely on that ground be struck out.

BALFOUR v. DRUMMOND.

Costs—Set-off—Severing defendants.

The costs of an interlocutory proceeding were awarded to the defendants. Upon taxation one bill only was allowed to the defendants S. and M. From the taxation S. appealed unsuccessfully, and was ordered to pay the costs to the plaintiff, but no direction was then made as to set-off. Afterwards the costs under both orders were taxed. The master made no apportionment between S. and M. of the costs payable to them. The plaintiff now applied to set off the costs payable by S. against S.'s share of the costs payable to S. and M.

Order made without costs.

BURBANK v. WEBB.

Continuing ex parte injunction—Misrepresentation of facts.

Upon a motion to continue an *ex parte* injunction it was objected that the Court had been misled when granting the injunction.

KILLAM, J., said: Nothing is of more importance than that a party obtaining an *ex parte* order for an injunction should deal with the utmost fairness and frankness with the Court; and if it were shown that such a party did so upon a false statement of information of a material fact, I should not

hesitate to refuse to continue it and to leave him in the position in which he was before getting the order; even though he shewed other grounds sufficient to warrant its being continued.

ATTORNEY GENERAL v. FONSECA.

Costs, security for—Allowance of bond—Form of bond—Style of cause.

On an application for the allowance of a bond for security for the costs of an appeal to the Supreme Court, the onus of satisfying the Court of the sufficiency of the security is upon the appellant.

Such a bond ought to be in favour of the respondent and not of the Registrar of the Court. One surety may, under certain circumstances, be sufficient.

In an affidavit one defendant was named "Hon. John C. Schultz." In all the other proceedings it was "John Christian Schultz."

Held, that the affidavit could not be read.

In re CAMPBELL.

Conveyances by half-breed children—Construction of Con. Stat. c. 42, s. 3.

In answer to a question submitted by the Registrar General for the opinion of the Court as to the construction of Con. Stat. c. 42, s. 3, the following report was returned:

KILLAM, J. (after discussing the matter at some length.) I shall therefore certify to the Registrar General that in my opinion the third section does not apply to, or empower, a half-breed minor between 18 and 21 years of age to convey or otherwise dispose of any portion of the 1,400,000 acres of land that he may be entitled to by inheritance or purchase; but that it applies to and empowers such half-breed child merely to convey or dispose of such specific portion of the 1,400,000 acres as may have been allotted to him by the Crown as his own share of those lands.

Supreme Court of Canada.

ONTARIO.] [14TH JUNE, 1888.

KLOEPFER v. GARDNER.

Assignment for benefit of creditors—Creditor disputing deed—Right to dividend.

Where a trader had assigned all his goods in trust for the benefit of his creditors, one of the creditors having obtained judgment against such assignor, seized some of the goods so assigned and on the trial of an interpleader issue attacked the validity of the assignment. The deed was sustained.

Held, affirming the judgment of the Court of Appeal, 14 A. R. 60, that such creditor was not debarred by the proceedings from participating in the benefits of the assignment and receiving his dividend thereunder.

J. Maclennan, Q.C., for the appellant.

McCarthy, Q.C., for the respondent.

CANADA ATLANTIC R. W. CO. v. TOWNSHIP OF CAMBRIDGE.

Municipal corporation - By-law—Voting on—Casting vote of returning officer—R. S. O. (1877) c. 174, ss. 152, 299.

S. 299 of c. 174 of R. S. O. (1877) provides that in case of a vote being taken on a municipal by-law, the proceedings at the poll and for and incidental to the same and the purposes thereof shall be the same, as nearly as may be, as at municipal elections, and all the provisions of sections 116 to 169, inclusive, of the Act, so far as the same are applicable, and except so far as is herein otherwise provided, shall apply to the taking of votes at such poll and to all matters incidental thereto.

And s. 152, one of the sections relating to municipal elections, so made applicable to the voting on a by-law, provides that "In case it appears upon the casting up of the

votes as aforesaid, that two or more candidates have an equal number of votes, the clerk of the municipality * * * whether otherwise qualified or not, shall, at the time he declares the result of the poll, give a vote for one or more of such candidates so as to decide the election."

Held, affirming the judgment of the Court of Appeal, 14 A. R. 299; 7 C. L. T. Occ. N. 284; that this section 152 is not applicable to the case of a vote on a by-law, and the returning officer in case of a tie on such voting cannot give his vote in favour of the by-law.

Chrysler, for the appellant.

O'Gara, Q.C., for the respondents.

CANADA SOUTHERN R. W. CO. v. BICKFORD.

Contract for hire—Rolling stock—Agreement to purchase railway—Appeal.

B., the contractor for building the E. & H. railway, and, practically, the owner thereof, negotiated with the solicitor of the C. S. R. Co. for the sale to the latter of the E. & H. railway when built. While the negotiations were pending B. went to California, and the agents who looked after the affairs of the E. & H. railway in his absence applied to the manager of the C. S. R. for some rolling stock to assist in the construction. The manager of the C. S. R. was willing to supply the rolling stock on execution of the agreement for sale of the road, which was communicated to B., who wrote a letter to the manager, in which the following passage occurred:— "If from any cause our plan of handing over the road to your company should necessarily fail, you may equally depend on being paid full rates for the use of engine and cars, and any other assistance or advantage you may have given Mr. Fauquier," (the agent).

The negotiations for the purchase of B.'s railway by the C. S. R. Co. having fallen through, an action was brought by the latter company against B. and the E. & H. Railway Co. for the hire of the rolling stock, which was resisted by B. on two grounds; one that the rolling stock was supplied in pursuance of the negotiations for the sale of his road to the plaintiffs, which had fallen through by no fault of B., and the other

that if the plaintiffs had any right of action it was only against the E. & H. Railway Co., and not against him.

By consent of the parties the action was referred to the arbitration of a County Court Judge, with a provision in the submission that the proceedings should be the same as on a reference by order of the Court, and that there should be a right of appeal from the award as under R. S. O. c. 50, s. 189.

The arbitrator gave an award in favour of the plaintiffs; the Queen's Bench Divisional Court held that there was no appeal from the award on the merits, and as it was regular on its face refused to disturb it; the Court of Appeal held that there was an appeal on the merits, but upheld the award; and the defendants then appealed to this Court.

Held, affirming the judgment of the Court of Appeal, that the arbitrator was justified in awarding the amount he did to the plaintiffs, and that B. as well as the company was liable therefor.

McCarthy, Q.C., and *Wallace Nesbitt*, for the appellants.

Cattanach, for the respondents.

BANK OF HAMILTON v. HARVEY.

Promissory note—Non-negotiable—Liability of maker.

H., a director of a joint stock company, signed, with other directors, a joint and several promissory note in favour of the Company, and took security on a steamer of the company. The note was, in form, non-negotiable, but that fact was not observed by the officials of the Bank of Hamilton, who discounted it and paid over the proceeds to the Company. H. knew that the note was discounted, and before it fell due he had in writing acknowledged his liability on it. In an action on the note by the Bank against H.

Held, affirming the judgment of the Court of Appeal, 7 C. L. T. Occ. N. 418, that although, in fact, the note was non-negotiable, the bank, in equity, was entitled to recover, it being shown that the note was intended by the makers to have been made negotiable and was issued by them as such, but by mistake or inadvertence it was not expressed to be payable to the order of the payees.

McCarthy, Q.C., and *Muir*, for the appellants.

Robinson, Q.C., and *E. Martin*, Q.C., for the respondents.

QUEBEC.]

REGINA v. DOWNIE.

Criminal Law—Indictment for perjury—Evidence of special facts—Admissibility of.

D. in answering *faits et articles*, on the contestation of a *saisie-arret*, or attachment, stated among other things:

1st. "That he, D., owed nothing for his board; 2nd. that he, D., from about the beginning of 1880, to towards the end of the year 1881, had paid the board of one Francis, the rent of his room, and furnished him with all the necessaries of life with scarcely any exception; 3rd. that he, Francis, during all that time, 1880 and 1881, had no means of support whatever."

Being charged with perjury in the assignments of perjury, and in the negative averments, the words used by D. in his answers were distinctly negatived, in the terms in which they were made.

At the trial evidence was adduced and not objected to at the time by D. to prove that he, Francis, had paid to D. in May or June, 1880, $42.00 for having boarded at his house in the month of May, 1880; that he had paid his board to Madame Duperrousel and part of his board to Francis Larin, and was held liable by the latter for part of his board during the months of September and October, 1880; that he was also held liable for part of his board at Mrs. Radford's during the months of January, February, and March, 1881, and by Britain for having boarded at the Victoria Hotel, in the months of April, May, June, July, and August, 1881; and also that he, D., had received from Francis an order on Benjamin Clements for $15, on account of which Clements had paid him, D., $7.50 in November, 1880."

Held, that under the general terms of the negative averments of the assignment it was competent for the prosecution to prove such special facts to establish the falsity of the answers given by D. in his answers on *faits et articles*, and therefore the conviction could not be set aside.

McCarthy, Q.C., for the appellant.

Hall, Q.C., for the respondent.

CANADIAN PACIFIC R. W. CO. v. CHALIFOUX.

Railway company—Carriers of passengers—Measure of obligation as to latent defects—Arts. 1053, 1675, C. C. P. Q.

Held, reversing the judgments of the Courts below, that where the breaking of a rail is shewn to be due to the severity of the climate and the sudden great variation of the degrees of temperature, and not to any want of care or skill upon the part of the railway company in the selection, testing, laying, and use of such rail, the company is not liable in damages to a passenger injured by the derailment of a train through the breaking of such rail; FOURNIER, J., dissenting on the ground that, as the accident was caused by a latent defect in the rail in use, the company was responsible.

Abbott, Q.C., for the appellants.

Geoffrion, Q.C., for the respondent.

FORSYTH v. BURY.

Judgment in licitation—Binding on parties to it—Constitutionality of an Act of incorporation—When its validity can be questioned and by whom.

The Island of Anticosti, held in joint ownership by a number of people, was sold by licitation for $101,000. The report of distribution allotted to the respondent (plaintiff) $16,578.66 for his share, as owner of one-sixth of the island acquired from the Island of Anticosti Company, who had previously acquired one-sixth from Dame C. Langan, widow of H. G. Forsyth.

The respondent's claim was disputed by the appellant, the daughter and legal representative of Dame C. Langan, alleging that the sale by her through her attorney, W. L. F., of the one-sixth to the Anticosti Company was a nullity, because the Act incorporating the company was *ultra vires* of the Dominion Government, and that the sale by W. L. F., as attorney for his mother, to himself, as representing the Anticosti Company, was not valid.

The Anticosti Company was one of the defendants in the action for licitation, and the appellant an intervening party; no proceedings were taken by the respondent prior to judg-

ment, attacking either the constitutionality of the Island of Anticosti Company's charter or the status of the plaintiff, now respondent.

Held, affirming the judgment of the Court below, RITCHIE, C.J., and GWYNNE, J., dissenting, that as Dame C. Langan had herself recognised the existence of the company, and as the appellant, her legal representative, was a party to the suit ordering the licitation of the property, she, the appellant, could not now on a report of distribution raise the constitutional question as to the validity of the Act of the Dominion Parliament constituting the company, and was now estopped from claiming the right of setting aside the deed of sale, for which her mother had received good and valuable consideration.

W. H. Kerr, Q.C., for the appellant.

Laflamme, Q.C., and *David*, for the respondent.

(Application for leave to appeal to the Privy Council was refused. See *Canadian Gazette*, Vol. 11., p. 418.)

NEW BRUNSWICK.]

MERCHANTS' MARINE INS. CO. v. BARSS.

Insurance—Marine—Interest insured—Not disclosed when policy issued—Right to claim on—Notice of abandonment—Authority to give.

B. & Co., part owners of the barque L., cabled to V., managing owner, at St. John, N. B., "insure hull * * * on our account." The application made by V. stated that "insurance is wanted by H. B. & Co. on account of themselves;" and the policy issued thereon insured the barque "on account of whom it may concern." The barque being lost, notice of abandonment was given to the insurers by V. on account of B. & Co., V. having no special authority to give such notice. B. & Co., who owned eight shares in the barque, claimed the insurance on behalf of themselves and other owners whom they represented, being twenty shares in all.

Held, that the insurers were not relieved on account of the value insured not being disclosed at the time of effecting the insurance.

Held, also, that V. had authority to give the notice of abandonment under his authority to insure.

Judgment of the Court below, *ante* p. 353, affirmed.

Weldon, Q.C., and *C. A. Palmer*, for the appellants.

J. G. Forbes, for the respondents.

MANITOBA.]

DEDRICK v. ASHDOWN.

Chattel mortgage—Power of sale—Exercise of—Possession of goods by mortgagor—Implied covenant for—Covenant not to sell goods—Ordinary course of business.

D., a trader, being indebted to A., gave him a chattel mortgage of all his stock in trade and business effects. The mortgage contained a clause, among others, to the effect that if the mortgagor should attempt to sell or dispose of or in any way part with the possession of the said goods and chattels or to remove the same from his business premises, the mortgagee might take possession of and sell them as in case of default in payment.

After the mortgage had been given and registered, A. obtained judgment in a suit previously begun against D., and issued an execution, under which the sheriff seized and sold the goods covered by the mortgage. The execution was set aside by the Court as being issued against good faith, and D. brought an action of trespass, with a count in trover, against A. for the wrongful seizure and conversion of his goods. Upon the pleas of not guilty and not possessed the defendant in such action attempted to justify his entry and seizure of the goods under the chattel mortgage, alleging a breach of the covenant not to sell.

Held, 1. That the terms of the chattel mortgage implied an agreement that the mortgagor was to remain in possession of the goods mortgaged until default, there being no express provision to the contrary.

2. That selling or disposing of the goods as in the above provision only meant sales other than in the ordinary course of business.

3. That the defendants acted in the seizure and sale of the goods only under the execution, and could not justify for the wrongful seizure under the mortgage, when the mortgagor was guilty of no default.

The judgment of the Court below, 4 Man. L. R. 139; 7 C. L. T. Occ. N. 125, reversed.

Ewart, Q.C., for the appellants.

Robinson, Q.C., for the respondents.

BRITISH COLUMBIA.]

REGINA v. JOHN.

Criminal law—Rape—Indictment—Conviction for assault with intent to commit.

An indictment for rape charged that the prisoner "violently and feloniously did make an assault and her the said R. then violently and against her will feloniously did ravish and carnally know, against the form, &c."

Held, affirming the judgment of the Court below, *ante* p. 88, on writ of error, that on this indictment the prisoner could be convicted of assault with intent to commit rape.

Robinson, Q.C., for the appellant.

McMichael, Q.C., for the respondent.

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ARMOUR, C.J., 4TH OCTOBER, 1888.

CUTLER v. MORSE.

Costs—Unnecessary counter-claim.

To an action on a building contract the defendant set up the defence that the work was incompletely and unskilfully done, and counter-claimed for damages by reason thereof.

The Master to whom the action was referred found that $177 should be deducted for unskilful and incomplete work from the amount claimed by the plaintiff, and that the plaintiff had suffered damage to the extent of $177.

Held, that the questions raised by the defendant might have been raised before the Judicature Act, and that he was not entitled to have the costs dealt with as if what he set up was properly a counter-claim.

W. M. Douglas, for the plaintiff.

Middleton, for the defendant.

[5TH OCTOBER, 1888.

In re BOBIER AND ONTARIO INVESTMENT ASSOCIATION.

Vendor and purchaser—Requisitions—Certified copies of deeds—Removing clouds on title—Lis pendens—Power of attorney—Compensation for deficiency in land sold.

Upon a petition under the Vendor and Purchaser Act.

Held, (1) Following *McIntosh* v. *Rogers*, 11 P. R. 389, that the purchasers were entitled to certified copies of registered deeds or memorials of deeds in the chain of title which the vendors were unable to produce.

The statute 10 Anne c. 18 does not bear such analogy to our Registry laws as to make *Cooper* v. *Emery*, 1 Phil. 390, an authority to the contrary.

2. That the purchasers were entitled to have removed from the registry as clouds upon the title: (a) A certificate of *lis pendens* in an action upon a mortgage which appeared by the registry to be discharged; because it could not be ascertained from the registry itself that the action was in respect of the discharged mortgage: (b) A second certificate of *lis pendens* in an action to set aside as fraudulent a deed in the chain of title under which the vendors claimed, the vendors not being parties to it; because the vendors, and, if the title passed, the purchasers, might be added as parties: (c) A power of attorney to sell the lands in question, although registered after the mortgage under which the vendors were

selling; because the vendors might be affected with notice of the interest claimed by the donor of the power, such interest having accrued, if at all, before the vendors obtained title.

3. Upon the evidence, that the purchasers were not entitled to a conveyance of or compensation for a small part of the land contracted for, to which the vendors were not able to make title.

Hoyles, for the petitioners, the purchasers.
W. R. Meredith, Q.C., for the vendors.

[12TH OCTOBER, 1888.

LEMAY v. MCRAE.

Award—Motion to set aside—Conduct and jurisdiction of arbitrator—Draft award—Admissions of arbitrator—Revoking submission—Discovery of new evidence.

Action upon a sub-contract for railway construction. Motion by the defendants to set aside the award of an arbitrator made upon a reference to him without provision for appeal, upon the ground that the arbitrator illegally and in excess of his jurisdiction received evidence of a verbal contract or understanding between the plaintiffs and defendants varying the written contract, and awarded payment to the plaintiffs for the timber supplied to the defendants not by board measure, as required by the written contract, but upon a different system of measurement; and upon the ground of the discovery of new evidence, that of one B., and the absence of a material witness, one M.; and upon grounds disclosed in the papers filed and especially in the memorandum or draft award showing the grounds upon which the award was arrived at.

Held, that the award being good on its face, and the draft award not being delivered with or accompanying the award, the case did not come within the exception stated in *Hodgkinson* v. *Fernie*, 3 C. B. N. S. 189.

Admissions made by the arbitrator, upon which his award was founded, in conversations with the defendants' solicitors were not available for the purpose of setting aside the award: see *Dinn* v. *Blake*, L. R. 10 C. P. 388; nor could the draft award or memorandum be any more available for such purpose than the oral admissions of the arbitrator.

Re Don Valley R. W. Co., L. R. 6 Eq. 429, distinguished.

East and West India Docks Co. v. *Kirk*, 12 App. Cas. 738, in which it was held that the Court had jurisdiction to revoke the submission if there was reasonable ground for supposing that the arbitrator was going wrong in point of law, even in a matter within his jurisdiction, does not affect the law as to setting aside awards laid down in *Dinn* v. *Blake* and other cases, because the chief reason urged was that after the award was made there could be no relief against it.

Held, also, that no case was made out for remitting to the arbitrator on the ground of the discovery of fresh evidence, because the defendants were aware of the evidence of M. while the reference was proceeding and did not ask for a commission or a postponement; and it was not shown that the evidence of B. could not have been obtained by reasonable diligence, and it was at any rate not such evidence as a new trial would be granted to obtain.

Robinson, Q.C., and *A. Ferguson*, for the defendants.

W. R. Meredith, Q.C., and *Delamere*, for the plaintiffs.

IN CHAMBERS.

[BOYD, C., 1ST OCTOBER, 1888.

WOLF v. OGILVY.

In re HAGAR.

Lunacy—Intervention of official guardian—Con. Rules 335 to 338—R. S. O. (1887) c. 44, s. 32.

Where a defendant in an action becomes of unsound mind after judgment, it is not proper to notify the official guardian to intervene without serving the defendant and obtaining an order of the Court by procedure analogous to that provided by Con. Rules 335 to 338.

But where a person has been found by the Court to be of unsound mind, the official guardian may be served without order or notice to the lunatic.

S. 32 of R. S. O. (1887) c. 44 must be limited to cases mentioned in the marginal note thereto, which correctly defines the scope of the enactment.

Langton, for the plaintiff.

J. Hoskin, Q.C., for the lunatics.

W. Barwick, for the curator of the lunatic Hagar.

[3RD OCTOBER, 1888.

In re HORNIBROOK.

Sale of land—Order of Court in infancy matter—Default of purchaser—Re-sale.

In a matter pending before the Court concerning the sale of infants' lands, an order was made directing the acceptance of an offer to purchase the lands. The purchaser having made default, the Master in Chambers made an order for payment of the purchase money and in default for a re-sale, and payment by the purchaser of any deficiency.

An appeal from this order on the grounds that the contract provided a penalty for default, viz., forfeiture of the deposit, and that the practice followed was not the proper one, as the sale was not under the standing conditions of the Court, was dismissed.

Masten, for the purchaser.

Beck, for the vendors.

[ROBERTSON, J., 28TH SEPTEMBER, 1888.

In re DOUGLAS.

Lunacy—Change of committee—Costs.

A motion was made on 16th April, 1888, before BOYD, C., in Chambers upon petition of John Douglas to declare James Douglas a lunatic, and to appoint the petitioner his committee. James Douglas being at the time in a public lunatic asylum, notice of the petition was served upon the superintendent, and counsel for the Inspector of Prisons and Public Charities appeared on the motion. An order was made declaring James Douglas a lunatic and appointing the Inspector

his committee, but reserving leave to move to substitute another committee.

On the 18th June, 1888. a motion was made before ROBERTSON, J., in Chambers to substitute John Douglas as committee, and affidavits of all the members of James Douglas' family were filed, stating that they objected to the appointment of an outsider to administer the affairs of a member of their family. It was also shewn that John Douglas was a man of substance and a proper person to be committee.

J. M. Clark, for John Douglas.

E. T. Malone, for the Inspector of Prisons and Public Charities.

Judgment was delivered on the 27th September, 1888.

ROBERTSON, J.—I think the petitioner has made out as strong a case as is possible to be made, and that John Douglas should be appointed committee of the person and estate of James Douglas in the place and stead of the Inspector of Prisons and Public Charities; John Douglas to act as such committee without remuneration; and I direct that it be referred to the Master to fix the security and to do all other acts necessary as usually done in such cases; the costs of the application and of the Inspector to be paid out of the estate of the lunatic as between solicitor and client.

[MACMAHON, J., 1ST OCTOBER, 1888.

REGINA v. LAVIN.

Warrant of commitment—Conviction—Variance—Motion to discharge prisoner—Enlargement—R. S. C. c. 176, s. 24.

In determining, upon a motion to discharge a prisoner, whether a warrant of commitment is defective, the Court cannot in view of s. 24 of the Summary Trials Act, R. S. C. c. 176, go behind the conviction: and the proper course where there is a conviction sufficient in law, and a variance between the conviction and warrant of commitment, is to enlarge the motion so as to enable the magistrate to file a fresh warrant in conformity with the conviction.

Cases cited by WILSON, C.J., in *Arscott* v. *Lilley*, 11 O. R. at p. 167, referred to.

And where the conviction alleged that the offence was committed in January, 1887, and the commitment January, 1888, the motion was enlarged accordingly.

Badgerow, for the Crown.

Bigelow, for the prisoner.

[THE MASTER IN CHAMBERS, 9TH OCTOBER, 1888.

HOGG v. GRIER.

Mortgage—Foreclosure—Subsequent incumbrancer—One period of redemption—One final order.

A præcipe judgment for foreclosure in an ordinary mortgage action was issued on 19th March, 1887. The local Master at Owen Sound, to whom a reference was directed, made his report on 5th January, 1888. A number of persons having liens or incumbrances were served by the direction of the Master with notice T., but only one, besides the plaintiff, viz., the Molsons' Bank, proved a claim. The others did not attend on the reference. The report appointed the 5th July, 1888, for payment of the plaintiff's claim. Default having been made, the plaintiff applied to the Master in Chambers for a final order of foreclosure against all parties; and the question arose whether further time to redeem should be allowed to the original defendants, the mortgagors.

W. H. Blake, for the plaintiff.

THE MASTER IN CHAMBERS held on the authority of *Webster* v. *Patterson*, 25 Ch. D. 626; *Platt* v. *Mendel*, 27 Ch. D. 246; *Doble* v. *Manley*, 28 Ch. D. 664; *Rice* v. *Murray*, 2 Man. L. R. 37; that no further time to redeem should be allowed to the mortgagors; and made a final order foreclosing all the defendants.

[12TH OCTOBER, 1888.

ELLIOTT v. CANADIAN PACIFIC R. W. CO.

Evidence — Sole witness of accident giving rise to action — Examination before trial.

In an action under Lord Campbell's Act an order was made for the examination before the trial *de bene esse* on behalf of the plaintiff of the only witness to the accident which occasioned the death of the deceased. It was provided that the examination should not be used at the trial unless the plaintiff was unable to procure the attendance of the witness.

J. H. Ferguson, for the plaintiff.

D. Armour and *W. H. Wallbridge*, for the defendants.

NOVA SCOTIA

In the Supreme Court.

CAIN v. UHLMAN.

Trespass to land—Assessment of damages—Verdict for plaintiff—Set aside where one of two grounds of claim not sufficiently proved, and verdict found generally—Improper rejection of evidence—Admissibility of evidence.

The plaintiff claimed damages for trespasses committed by the defendant's cattle on his lands, and damages sustained by reason of the overflow of water on the plaintiff's land caused by a dam erected by the defendant.

The jury found in favour of the plaintiff on both grounds of his claim, assessing the damages generally at $50.

As to the first claim the Court was of opinion that the evidence sustained the plaintiff's allegation, but as the damages were assessed generally and there was some doubt whether the liability of the defendant for the overflow of the water was established, the finding of the jury was set aside and a new trial was granted with costs.

At the trial evidence was rejected which had been offered by the defendant to prove the respective levels of water at the point where the dam was erected and at the meadow alleged to have been overflowed in consequence of the erection. The witness whose evidence was rejected testified that he was a practical mill builder, that he had erected water power mills, and that in doing such work he had to take levels to get a height, but that he did not know how to use a theodolite.

Held, that the evidence should have been received.

Per RITCHIE, J.—The weight to be given to the evidence was a matter for the jury under the direction of the Court, and the competency of the witness to take levels and to make measurements should have been a subject of cross examination.

Expert evidence is an opinion by a qualified person on facts already proved involving scientific or technical knowledge, and is not evidence of things done or measurements taken which any one is competent to prove, the weight to be given to his evidence depending upon his ability.

METZLER v. SPIKE.

Will—Construction of bequest—Uncertainty—Election.

The testator owned a property in Spring Garden Road in the city of Halifax, consisting of a leasehold from the city for the period of 999 years, upon which were erected a house and a cottage together with a barn and out-buildings. The cottage was built when the testator acquired the property, and the house was erected subsequently. The two were included in one mortgage, but there had been a fence between the house and cottage for a period of thirty years, and the two had been separately occupied and assessed. By his will the testator gave to his daughter M. S. one share of the residue of his estate, or, at her election, "the house and premises owned by me on Spring Garden Road."

Held, that the devise was not void for uncertainty, but that the devisee could elect which of the two houses she would take.

That the house and cottage having been rented separately, and the ground immediately surrounding the cottage having been fenced off from the remainder of the lot for thirty years, there was no reason for assuming that the testator intended it to pass with the house and premises.

SPINNEY v. MATTHEWS.

Promissory note—Consideration.

The plaintiff was one of a number associated for the purchase of a fish-trap, and advanced the whole of the purchase money. McC., one of the associates, sold half his interest to the defendant, and a note signed by McC. and the defendant was delivered to the plaintiff to be credited on McC.'s debt to the plaintiff on account of the purchase, the plaintiff having refused to take the defendant's note without security.

Held, that the case did not come within the decision in *Cossitt* v. *Cooke*, 5 R. & G. 84, and that the plaintiff could recover.

McGEE v. PERKINS.

Bail—Record must be filed—Production of bail-piece not a sufficient answer to a plea of nul tiel record—Matter of defence to be available must be pleaded.

In an action on an alleged recognizance of bail, set out in the plaintiffs' declaration as entered into by the defendants to respond a judgment to be finally given on a rule *nisi*, taken under the statute under the former practice, the defendants admitted the making of the bail-piece, which was signed by them before R. J. U., as commissioner, admitted to be such, who also took their affidavits of justification, and, being prothonotary, had them filed with the bail-piece, but the recognizance was not reduced to writing, nor did it appear upon any record of the Court.

The defendants pleaded, among other things, that there was no record of the alleged recognizance of bail remaining in the Court as it was set out in the plaintiffs' declaration.

Held, that the production of the bail-piece alone, worded "to respond the judgment to be finally given herein on a rule *nisi* for a new trial under the statute," was not sufficient proof of the plea.

It being admitted that no execution had ever been issued,

Held, also, that if the defendants could avail themselves of that defence, the plaintiffs could not recover.

But that the defence was not available, not having been pleaded.

JOST v. McNEILL.

Judgment—Proceedings to revive must be in the name of the original parties or their legal representatives—Matter of record.

The plaintiff, as assignee of the original judgment creditors of the defendant, applied by writ of revivor to have execution in her own name against the defendants.

Held, that the judgment must be revived in the name of the original parties, or their legal representatives in case of death.

Both practice and precedent require that a judgment, once made a matter of record, should not be afterwards varied in its essential features.

Construction of R. S. (4th series) c. 94, s. 355.

In re HEDLEY.

Affidavit—Appeal from Commissioner of Mines—Notary Public—R. S. c. 107, s. 5.

W. H. made application for a lease of certain gold mining areas, which was opposed, and a contestation took place before the Commissioner of Mines as to the rights of the contending applicants. Pending the contest, and before any decision, W. H. died. The decision being against the deceased, his widow, who was appointed sole executrix, gave notice under the statute of her intention to appeal, and made an affidavit embodying the requirements of the statute, and filed the bond required. The affidavit was made in Toronto before a notary public for the Province of Ontario.

Held, that the affidavit was not made in accordance with the requirements of the statute, and that the appeal must be set aside for irregularity.

Construction of R. S. (5th series) c. 107, s. 5.

HORTON v. TOBIN.

Building contract—Liquidated damages—Set-off.

By a written agreement between the plaintiff and defendant the plaintiff agreed to repair a building owned by the defendant, the work to be completed by a certain day under a penalty of $25 per week for every week that the building remained unfinished after that date, the $25 per week to be settled and stipulated damages for delay. The contract was not completed at the date specified, nor for some time after. The plaintiff sued the defendant for $384.25, the full balance claimed to be due to him under the contract. The defendant paid $184.25 into court and claimed to set off $25 per week for eight weeks' delay in completing the contract.

The Judge below found the $25 per week mentioned in the agreement to be liquidated damages, but held that the work was substantially done at the expiration of three weeks from the date mentioned in the agreement, and therefore only allowed the defendant $25 per week for three weeks. The defendant appealed from that part of the judgment apportioning the damages. On appeal to a Divisional Court the judgment was sustained. The defendant appealed to the full Court.

Held, that the defendant was entitled to off-set the $15 per week for the full period of eight weeks, it appearing from the evidence that certain portions of the repairs were incomplete until the expiration of that period. The fact that the defendant moved into the house before the repairs were complete was not a waiver of his right to claim for the full period during which the repairs remained incomplete. Judgment was ordered to be entered for the defendant for all the costs including those in the Court below.

FULLERTON v. BRUNDIGE.

Plan annexed to deed—How treated—Trespass to land—Effect of possession as against a party not showing title.

When a plan is referred to in a deed as part of the description, all the particulars appearing on that plan are to be regarded as if they had been fully set out in the deed.

In an action for trespass to land the plaintiff relied on a grant from the Crown to B., a conveyance from B. to M., and a conveyance from M. to the plaintiff. The grant to B., read in connection with a plan annexed thereto, covered the locus, but in the subsequent conveyances no mention of the plan was made, although the description was the same as that in the grant. The plaintiff's evidence showed that M., to whom the property was conveyed by the original grantee, erected a fence including the locus, and cultivated the land, and that the possession had been continued by the plaintiff and his tenants down to the commencement of the action.

Held, that this evidence was sufficient as against the defendants, who showed no title.

McDONALD, C.J., dissented.

ROYAL CANADIAN INSURANCE COMPANY v. PUGH.

ROYAL CANADIAN INSURANCE COMPANY v. MERCHANTS' MARINE INSURANCE COMPANY.

Insurance—Marine—Time of sailing—Statement as to in application—Held to be a warranty—Materiality—Policy.

The plaintiffs, a company doing marine business in Montreal, were in the habit of granting policies of insurance on cargoes of grain, and of re-insuring the risks in five Halifax offices. There was an oral agreement on the part of the Halifax companies to do the business "if the risks suited them."

On the 17th November, 1880, the defendant companies accepted an application for re-insurance containing the words, in answer to the question "when to sail," "on or before the

20th instant." The defendants inserted in their policies a warranty that the vessel would sail as stated. She did not so sail, but left subsequently, and got on shore in the St. Lawrence. It appeared that it was the practice of the companies to insert such statements in their policies as warranties, and that where time was extended an increased premium was charged. In this case an application for an extension of time was made and refused.

In an action to reform the policies by striking out the warranty,

Held, that the words in the application were not a mere representation, but that there was a mutual contract, by which, in consideration of the defendants agreeing not to charge more than a fixed amount for premium, the plaintiffs contracted that the vessel should sail within the time specified.

That the plaintiffs having so contracted, the statement in the application as to the time of sailing was properly inserted in the policy as a warranty.

SHANNAHAN v. RYAN.

Negligence—Public street—Liability of party excavating in for negligence—Obligation to observe conditions of permit—Contributory negligence—Plaintiff need not disprove—Verdict for plaintiff sustained—Questions submitted to jury—Judge's charge.

The plaintiff was injured by falling into a trench opened by the defendant, under a permit from the city, across the sidewalk of a public street, for the purpose of connecting his premises with the main drain.

Held, that there was no onus on the plaintiff to disprove contributory negligence, but that the defendant must maintain his defence independently of the plaintiff's case.

Also, that the defendant having been guilty of negligence in not having a watchman present, and not having observed the conditions upon which the permit was granted in that respect, the verdict for the plaintiff must be sustained.

Also, that the character of the evidence justified the learned Judge in submitting the questions set out in the case to the jury, and that his charge was a proper one.

KITCHEN v. McDONALD.

Specific performance—Conflicting evidence—Verdict of jury sustained—Amendment of statement of claim—Power of Court to interpose to protect interests of parties.

In an action to enforce the specific performance of an agreement alleged to have been entered into by the defendants in relation to certain property assigned to them by one of the plaintiffs, the jury found in the plaintiffs' favour.

The evidence being of a conflicting character, and the case having been fairly submitted to the jury, the Court refused to disturb their findings.

The statement of claim prayed that certain money should be paid to the Pictou Bank, but the judgment as entered authorized the plaintiffs to enforce payment to them. It appearing that an amendment to that effect had been permitted by the trial judge,

Held, that the amendment so allowed cured the objection, but, if it appeared that the interest of the bank or of other parties interested in the disposition of the fund, required the interposition of the Court, the Court had power to make such order in reference thereto as the rights of parties or the justice of the case required, without necessitating a new trial, if not required by the facts of the case.

REGINA v. SALTER.

Canada Temperance Act—Conviction for third offence made in absence of defendant set aside—Procedure under the Act.

The defendant was convicted in her absence of a third offence against the Canada Temperance Act, and was sentenced to imprisonment for sixty days in the county jail at Annapolis, and to pay the sum of $9.33 costs to the prosecutor, and in default to be imprisoned for a further term of fifteen days.

Held, that the magistrate had exceeded his jurisdiction in making the conviction in the absence of the defendant, and that the conviction must therefore be set aside.

Held, also, that under the Canada Temperance Act, s. 107, it is imperative upon the magistrate to adopt the procedure specially made for cases under the Act, the express provision in that section taking the matter out of the ordinary course laid down in the Summary Jurisdiction Act.

UNION BANK v. WHITMAN.

Assignment for benefit of creditors—Hindering and delaying creditors—Release of debtor—Resulting trust—Statute 13 Eliz. c. 5.

A. W. C. & Son made a deed of assignment to the defendant W. of their real and personal property in trust for the benefit of their creditors. The deed provided that certain first preference creditors should be paid in full; that certain second preference creditors should next be paid in full, and that other creditors, who should become parties to the deed, should next be paid *pro rata*, without preference or priority, and that the balance, if any, should be reconveyed by the assignee to A. W. C. & Son. The deed contained a provision that the assignee should not be liable or accountable for more money and effects than he received, nor for any loss or damage which might happen in reference to the trusts mentioned, unless it should arise through his own wilful neglect. It also contained a provision requiring a release of all claims against the debtors from the creditors executing the deed, and excluding all creditors who should not become parties thereto.

Held, that the deed was void as hindering and delaying creditors within the meaning of the statute 13 Eliz. c. 5.

A resulting trust such as that created in favour of the debtor will vitiate any deed of assignment made with a similar object in view and containing such a provision.

HUGHAN v. McCOLLUM.

Bill of sale—Void for uncertainty—Counter-claim—Amount below jurisdiction of Court—Costs.

The plaintiff claimed a cow under a bill of sale from one M. by which M. conveyed to the plaintiff "One red cow four years old, valued at $21."

Held, that the description was void for uncertainty, as it did not in any way distinguish the cow so that it could be identified.

Held, also, that the defendant could not recover anything on a counter-claim, pleaded by him, beyond money paid into Court, the amount being below the jurisdiction of the Court.

Per McDONALD, C. J.—A counter-claim under the Judicature Act is in the nature of a set-off, and the plaintiff having admitted the amount to the extent of the payment into Court, the defendant was entitled to the costs of proving his claim, although the amount set up was below the jurisdiction of the Court, had the defendant sued for it.

NEW BRUNSWICK.

In the Supreme Court.

REGINA v. GROVES.

Canada Temperance Act—Variance between information and summons as to date of offence—Amendment—Adjournment of hearing—Certiorari.

The information in a prosecution under the Canada Temperance Act stated a sale of liquor by the defendant on the 2nd March, but the summons stated the sale to have been on the 7th April. The evidence proved sales on both days, and the conviction was for selling on the 7th April. No objection was taken at the trial that the defendant was misled by the variance.

Held, that if such an objection had been taken, the variance might have been amended under s. 116 of the Act.

Quære, as to the effect of the magistrate refusing to adjourn the hearing to enable the defendant to obtain witnesses, if he has reason to believe the application is not *bona fide*.

REGINA v. DOHERTY.

Order nisi—Neglect to serve affidavits and grounds, as directed.

Where a party obtaining an order *nisi* for a *certiorari* was directed by the Judge to serve the prosecutor with copies of his affidavits and grounds, but neglected to do so, the order was discharged.

JOHNSON v. DEVEBER.

Judgment—Irregularity—County Court—Summons not served personally—Order perfecting service—Waiver of irregularity—Entry docket—Whether required in the County Court—Insolvent Act of 1875—Judgment obtained by insolvent—How enforced by assignee.

Where a summons is not served personally, and an order perfecting service has not been obtained, the judgment signed is irregular only.

Semble, that the County Court Act does not require an entry docket to be filed.

If a judgment creditor makes an assignment under the Insolvent Act of 1875, and the debt is sold by the assignee, an execution subsequently issued in the name of the insolvent will be set aside, it not appearing that it had been authorized either by the assignee or the purchaser.

The assignee cannot issue execution on a judgment obtained by the insolvent, without making himself a party to it by *scire facias*.

REGINA v. PHILLIPS.

Canada Temperance Act—Certificate of previous conviction—What it is evidence of—Certificate by same magistrate who tries subsequent offence—Proclamations bringing Act into force—Judicial notice of—Summary Convictions Act, s. 92.

A certificate of a previous conviction for selling liquor under the Canada Temperance Act, s. 115, is sufficient evidence to prove the fact of such conviction. *Per* ALLEN, C.J., FRASER and TUCK, JJ., (WETMORE, J., dissenting.)

Such certificate may be given by the same magistrate who tries the subsequent offence.

By the Summary Convictions Act, s. 92, Courts are bound to take judicial notice of proclamations and orders in council bringing the Canada Temperance Act into force.

MONTGOMERY v. MONTGOMERY.

Judgment as in case of a nonsuit—Form of notice of motion.

It is sufficient in a notice of motion for judgment as in case of a nonsuit, to state that it will be made pursuant to the statute, etc., without stating the particular ground of the application.

SAVOY v. McEACHERN.

Will—Devise—Remainders—Vested or contingent—Power of sale—Intestate estates.

A testator seised of real estate devised it to his wife during her life, and upon her death to his daughters to be equally divided between them; and he also empowered his wife, if she thought it necessary to do so, to sell the estate and apply the proceeds for her own and his daughters' benefit. The widow died without having sold any of the real estate under the power.

Held, that the testator's daughters took vested estates under the will.

Doe dem. Wood v. *DeForest*, 23 N. B. Rep. 209, followed.

HAMMOND v. CITIZENS' INSURANCE COMPANY OF CANADA.

Insurance—Fire—Misdescription of buildings in application—Materiality of—Representation or warranty—Delay in filing proof of loss—When delay caused by company—Examination of insured—Effect of refusal to compromise—Keeping gunpowder on premises—Whether policy avoided by—Where property insured in another company—Recovery of pro rata amount.

A policy of insurance described the property insured as a two storey frame building with shed and stable attached, situate, etc., occupied by the plaintiff as a store and dwelling; and a stock of general merchandize contained in the said building. One of the conditions of the policy stated that if any person should insure his building or goods, and should describe them otherwise than as they really were, or over-value them to the prejudice of the insurers, or should misrepresent or omit to communicate any circumstance which was material to be made known to the insurers as regards the risk itself, or surrounding premises, in order to enable them to judge of the risk they undertook, the insurance should be of no effect in respect of the property regarding which the misrepresentation or omission was made; the policy being issued on the representations made by the assured in his application, which was the basis, and formed a component part of the policy.

The following questions were asked in the form of application furnished by the insurers: 1. What is the building, and for what purpose used? 2. Is the building wholly occupied by the applicant, and if so, for what purpose? The answer to the first question was: "A two-storey frame building with shed and barn attached." To the second question: "The whole of the premises occupied by the applicant as a dwelling and store." A diagram accompanied the application, on which the several parts of the property were marked respectively "dwelling house," "shed," and "barn." The barn was divided by a partition, one part of it being used as a stable for cattle, and the other part as a store-room for merchandize.

Held, that the statement of description was matter of representation and not warranty, and that upon the verdict for plaintiff it must be assumed that there was either a proper description or no misdescription to the prejudice of the company.

A condition of a policy on goods declared that the insured would not be liable for loss or damage occasioned by keeping explosive substances in quantity exceeding the allowance by local laws, or the storage on the premises of gunpowder, glycerine, etc., except for manufacturing purposes, and then only in such quantities as are necessary for carrying on the trade; and that any excessive, unnecessary, or unusual quantity would avoid the insurance. The application was for insurance on a general stock of goods as usually kept in a country store, and the policy was on a stock of general merchandize. The quantity of gunpowder in the store did not exceed 15 or 18 pounds, not more than would ordinarily be found in a stock of general merchandize.

Held, that as the loss was not occasioned by the explosion of the gunpowder, and as the quantity kept was not excessive, unnecessary, or unusual, it was not within the exception of the policy.

Where a policy required that persons sustaining loss should forthwith give notice thereof to the company, and apply for its blank forms, and execute and file the proof of claim, within 15 days after the fire; and the plaintiff gave notice to the insurers' agent and applied for blanks within the time, but did not receive the blanks till after the 15 days had expired.

[illegible] that he [illegible] [illegible] [illegible]

ONTARIO.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ARMOUR, C.J., 3RD OCTOBER, 1888.

ROWLAND v. BURWELL.

Reference, scope of—Judgment—Pleadings—Con. Rules 56, 57.

A judgment directed that the Master should take the usual accounts for redemption or foreclosure of mortgaged premises, and should also take the accounts in respect to certain other matters set out in the pleadings. Under this the defendant contended that the Master should take into account a certain sale by the plaintiff as mortgagee to a person who, it appeared, had not paid his purchase money. There was no specific mention of this sale in the pleadings or judgment.

Held, that the proposed inquiry was not within the scope of the pleadings or the judgment, or of Con. Rules 56 and 57; and the questions which it would raise were questions which ought to have been raised by the pleadings and determined by the Court, and not delegated to the Master.

Bickford v. *Grand Junction R. W. Co.*, 1 S. C. R. at p. 725; *McDougall* v. *Lindsay Paper Mill Co.*, 20 U. C. L. J. 133; *Wiley* v. *Ledyard*, *ib.* 142, referred to.

E. R. Cameron, for the plaintiff.

R. M. Meredith, for the defendant.

CHANCERY DIVISION.

[BOYD, C., 21ST SEPTEMBER, 1888.

MACLENNAN v. GRAY.

Mortgage—Bar of dower—Prior registration—Surety—Merger.

G., the owner of certain land, devised it to his two sons R. and J., charged with an annuity of $150 to his widow, and also with certain legacies to two other sons. After G.'s death in March, 1879, R. and J. mortgaged the land to one C. This mortgage was not registered till January, 1880, though the widow knew of it.

R. and J. then raised money from the plaintiff in November, 1879, by a mortgage, which was registered in the same month, the plaintiff having no knowledge of C.'s mortgage and therefore gaining priority. In this mortgage to the plaintiff the widow joined barring her dower and releasing her annuity for the benefit of the plaintiff. The plaintiff sold the land under his mortgage and there was a surplus of $1,612. The question was whether the widow as dowress and annuitant had priority over C.

Held, that she had; for the priority gained by the plaintiff over C. by reason of his prior registration enured to her benefit as surety. The fund (so to speak) out of which C.'s mortgage was to be primarily paid was increased by the act of the law based upon the default of the mortgagee first in point of time.

Held, further, that the fact that the widow had accepted a conveyance of a moiety of the land from R. did not cause her annuity to merge in whole or in part, the mortgage to C. intervening; and it therefore not being to her interest to hold that a merger had taken place. The question of interest governs merger in the absence of express intention.

H. J. Scott, Q.C., for the mortgagee C.

A. C. F. Boulton, for the widow.

[22ND SEPTEMBER, 1888.

In re CENTRAL BANK OF CANADA.

BAINES' CASES.

NASMITH'S CASE.

Company—Winding-up—Banking Act—Payment of ten per cent. on subscription—Transfer of shares—Marginal transfer—Shareholders within month from suspension—Bank dealing in its own shares—R. S. C. c. 120, ss. 20, 29, 45, and 77.

Where ten per cent. was not paid at the time of original subscription of bank shares, nor within 30 days thereafter, as required by the Banking Act, R. S. C. c. 120, s. 20, but was paid before the first transfer took place and was accepted by the bank;

Held, that subsequent transferees of the shares were properly placed upon the list of contributories in winding-up proceedings.

The provision as to payment, is for the protection of the public, and till payment is made the person subscribing may not be able to deal with the stock, but he is at least equitable owner, and may become legally entitled on making the prescribed payment.

Where the evidence showed that the bank had adopted the practice of dealing with their shares by way of marginal transfer, the first transfer being made in blank, subject as by marginal note, to the order of a broker, and the ultimate purchaser signing an acceptance in the book immediately under the transfer so signed in blank by the seller, the intermediate dealing of the broker being omitted from extended record in the bank books, and the transferees were duly entered as shareholders in the stock ledger of the bank;

Held, that this amounted substantially to an acceptance of shares transferred in blank, which is lawful where transfer by deed is not prescribed; and the entry in the stock ledger amounted to registration within the meaning of the Act, and though in one case the transferee did not sign the acceptance, yet he subsequently dealt with the shares by selling and transferring them to another, and the transferees were pro-

perly placed on the list of contributories, notwithstanding anything in the Banking Act, R. S. C. c. 120, s. 29.

Where one of those placed upon the list of contributories acquired his shares within one month from the suspension of the bank;

Held, that he was liable as a contributory. R. S. C. c. 120, s. 77, is cumulative, so as to make *also* liable those who have been holders during the month preceding the suspension, leaving them to discuss among themselves their respective liabilities.

Where the shares which had been transferred to one placed on the list of contributories had been previously held by the cashier of the bank "on trust," as alleged, for the bank, which it was objected was thus trafficking in its own shares;

Held, that even if the cashier did hold the shares in trust for the directors or the bank, this would not be necessarily illegal, as he might have such shares under s. 45 of the Banking Act as security for over-due debts; and besides, this was a matter which, though it might give the appellant a right to rescind during the currency of the banking institution, becomes of no moment after the rights of creditors, represented by the liquidators, arise.

The matter was not an absolute nullity, but at most one which the shareholder could waive as voidable, and it became by the suspension of unimpeachable validity as between the appellant and the liquidators.

A. C. Galt, for the appellants.

Foster, Q.C., for the liquidators.

[ROBERTSON, J., 15TH JULY, 1888.

GLASS v. GRANT.

Insolvency—Fraudulent mortgage by insolvent—Action by assignee to set aside—Defence of foreclosure proceedings after assignment by insolvent—Demurrer—Res judicata—Assignee of insolvent—Trustee for creditors.

The plaintiff, as assignee for the benefit of creditors of one C., brought an action to set aside a mortgage made by C. to the defendants while insolvent, as fraudulent. The defendants

set up *inter alia* as a defence certain foreclosure proceedings which had been taken, to which G. was a party defendant as assignee, and in which a judgment of foreclosure had been obtained on a demurrer to this part of the statement of defence.

Held, that the plaintiff acted in a dual capacity, and that the foreclosure proceedings were taken against him as assignee of C. and not as trustee for the creditors; and that the plaintiff could not set up the fraud of his assignor; and that he was not bound to set up by way of counter-claim in the foreclosure action his cause of action in this suit; and that the foreclosure judgment was not a bar to this action.

The Duchess of Kingston's Case, 2 Sm. L. C. (7th ed.), 792, commented upon.

Hellmuth, for the demurrer.
James Maclennan, Q.C., contra.

[5TH OCTOBER, 1888.

MOORE v. ONTARIO INVESTMENT ASSOCIATION.

Company—Action for deceit—Demurrer.

Demurrer to a statement of claim in an action for deceit whereby the plaintiff was induced to purchase shares of stock in the defendants' company and practically from the company, which were valueless, by reason of false and fraudulent statements in the annual report of the company and in letters written to him by the president of the company, over-ruled with costs.

A corporation may be held liable in an action for deceit.

Shepley, for the demurrer.
Moss, Q.C., contra.

IN CHAMBERS.

[BOYD, C., 16TH OCTOBER, 1888.

McLEAN v. BRUCE.

Examination—Proof of service of appointment and payment of conduct money—Examiner's certificate—Waiver.

Upon a motion by the defendant to compel the plaintiff to to attend for examination after his refusal to be sworn upon an appointment for his examination upon an affidavit filed on a pending motion, the only material filed was a certificate of the examiner, which did not shew that due service of subpœna and appointment and payment of conduct money had been made.

Semble, the certificate of the examiner as to these points would not have been sufficient; and

Held, that in the absence of evidence it was not to be inferred from the fact that the plaintiff attended at the time and place appointed for his examination, that there was any right then to examine him; and the plaintiff did not by such attendance waive his right to have the service and payment proved.

H. Cassels, for the plaintiff.

F. C. Moffatt, for the defendant.

FOSTER v. VANWORMER.

Judgment debtor—Examination—Duty of debtor—Unsatisfactory answers—Notice of motion to commit.

It is the duty of a party who is examined as a judgment debtor to furnish such explanation about his affairs as will place his dealings in an intelligible shape and not leave his creditors to find out as best they may what it is the business of the debtor to make clear.

Nor is it enough for the debtor to say touching any particular transaction that he does not know or does not remember, if he have the means at hand to qualify himself to explain.

A notice of motion seeking relief against a party for giving unsatisfactory answers on his examination should particularize the answers complained of.

Precision should be used on the examination in ascertaining the exact state of facts, as shewn in books or accounts, and care exercised that there is no uncertainty as to any dates or amounts in question, as the Judge can only look at what is proved or admitted.

On the state of facts referred to in the judgment, the defendant was ordered to attend and be further examined at his own expense and to pay the costs of a motion to commit him for unsatisfactory answers.

Ex p. Bradbury, 14 C. B. 15, and *Ex p. Moir*, 21 Ch. D. 61, followed.

Crooks v. *Stroud*, 10 P. R. 131; *Lemon* v. *Lemon*, 6 P. R. 184; and *Hobbs* v. *Scott*, 23 U. C. R. 619, discussed.

A. R. Creelman and *Macrae*, for the motion.

Walter Barwick, contra.

HALL v. GOWANLOCK.

Discovery—Libel—Privilege—Answers tending to criminate—Costs.

No man can be compelled to answer a question incriminating himself.

And where the defendant upon his examination for discovery in an action of libel refused to answer questions as to the authorship of the alleged libel, and claimed privilege, not before the examiner, but afterwards upon a motion by the plaintiff to commit him for refusal to answer, swearing positively that the answers might tend to criminate himself:

Held, that he was entitled to the privilege, and that he was not too late to claim it.

The costs of the motion to commit were made costs to the plaintiff in the cause.

Kilmer, for the plaintiff.

John Douglas, for the defendant.

[ARMOUR, C.J., 9TH OCTOBER, 1888.

McLEOD v. SEXSMITH.

Judgment under Con. Rule 756—Stage of action when ordered—Admissions in letters.

An application for judgment under Rule 756 cannot be made until the right of the party applying to the relief claimed has appeared from the pleadings.

And an order made under that rule before the delivery of any pleading in the action, based on admissions in letters, was set aside.

T. Langton, for the plaintiff.
C. J. Holman, for the defendant.

[24TH OCTOBER, 1888.

In re SOLICITOR.

Solicitor and client—Costs, taxation of—Disallowance of costs of unnecessary proceedings—Interest—Appeal—Time.

The mere non-communication by a solicitor to his client of an offer of settlement does not prove that proceedings after the offer were unnecessary, and that the costs of them should be disallowed under Con. Rule 215, unless it is shown that the offer was an advantageous one, the acceptance of which the solicitor ought to have advised, and it can be fairly inferred that he refrained from communicating it and advising its acceptance merely for the purpose of putting costs into his own pocket and without regard to the interests of his client.

A taxing officer has no authority to charge a solicitor with interest upon moneys in his hands belonging to his client.

The time for appealing from a taxation of costs begins to run from the date of the certificate of taxation, not from the date of each ruling in the course of taxation.

Aylesworth, for the solicitor.
W. H. P. Clement, for the client.

[26TH OCTOBER, 1888.

SCOTT v. DALY.

Costs—Party and party—Status of solicitor.

The defendant in this action was represented by a firm, purporting to be a firm of solicitors, one of the members, however, not being a duly admitted or certificated solicitor. The plaintiff objected to the costs awarded the defendant in the action being taxed to him.

Held, that in the absence of proof that these costs had not been paid by the defendant to the persons who acted as his solicitors, the objection could not prevail; nor could it even if that proof had been given.

Reeder v. *Bloom*, 3 Bing. 9;——v. *Sexton*, 1 Dowl. 180, followed.

D. W. Saunders, for the plaintiff.

Delamere, for the defendant.

[FERGUSON, J., 26TH SEPTEMBER, 1888.

In re BOOTH'S TRUSTS.

Devolution of Estates Act—R. S. O. c. 108, s. 8—"Devolve"—Will—Devise to executors with power of sale.

Where a will gave the land of the deceased to the executors and gave them the power to sell it;

Held, that the case was not within s. 8 of the Devolution of Estates Act, and the written consent or approval of the official guardian of infants was not necessary to a sale of the land.

The word "devolve" in this section is not used in its strict and accepted meaning of falling upon one by way of succession, but in the sense merely of "passing;" and what is meant is that when infants are concerned no real estate which but for the preceding sections would not come to the executors or administrators by a devise, gift, or conveyance, can be validly sold without the written consent of the official guardian.

J. Hoskin, Q.C., as official guardian.

Carson, for the executors.

J. R. Miller, for the intending purchaser.

[ROBERTSON, J.. 8TH OCTOBER, 1888.

WHITE v. RAMSAY.

Action for recovery of land—Joinder of other causes of action—Con. Rule 341.

The plaintiff, without leave, joined other causes of action in an action for the recovery of land, contrary to Con. Rule 341.

Upon a motion by the defendant to set aside the writ of summons, the Master in Chambers made an order for the amendment of the writ by striking out the portion of the indorsement containing the other claims, upon payment of costs.

ROBERTSON, J., on appeal, upheld the Master's order.

Hoyles, for the defendant.

C. J. Holman, for the plaintiff.

NOVA SCOTIA

In the Supreme Court.

BONNETT v. RITCHIE.

Bond of indemnity to sheriff—Action on—Condition to save harmless—Recital of paper of a different date—Judgment against sheriff in respect of the subject matter of the bond gives right to action.

The plaintiff, as sheriff of the county of Annapolis, sued the defendants on a joint and several bond of indemnity given by them to indemnify him against all losses, etc., incurred in respect of the sale of certain property taken by him under a writ of execution, issued on a judgment recovered by the defendants against W. P. S., the property having been claimed by D. B. under a bill of sale.

The property having been sold by the plaintiff under the execution, he was sued by D. B., and judgment recovered against him.

The bond of indemnity recited a "bill of sale dated the—— day of August, 1883," while, by an amendment after the commencement of the suit, judgment was recovered on a "bill of sale dated the 1st August, 1881, or, in the alternative, under an assignment dated on the 12th January, 1883."

The condition of the bond of indemnity bound the defendants "from time to time, and at all times hereafter, well and sufficiently to save harmless and keep indemnified the said sheriff * * *. from and against all losses, costs, charges, damages, and expenses * * * by reason of selling the said property so seized * * * and also from and against all actions * * * * or any procedure at law or in equity which now, or shall, or may at any time be brought, commenced, or prosecuted rightfully or wrongfully against the said sheriff * * * for or by reason or means of the selling of the said property."

Held, that the words of the condition were sufficient to protect the plaintiff, and were not controlled by the words in the recital, in such a way as to limit the liability of the defendants to a claim under the particular bill of sale therein mentioned.

Held, also, that the recovery of the judgment in respect to the matter against which the plaintiff had been indemnified gave him a right of action, and that he was not obliged to wait until payment of the amount of the judgment had been enforced before commencing his suit.

GALLIHEW v. PETERSON.

Canada Temperance Act—Information and warrant must shew facts giving jurisdiction to justice—Jurisdiction of inferior court—Intendment as to—Constable and assistant.

In an action for the conversion of a quantity of intoxicating liquors, the defendant justified as a constable, acting under a warrant purporting to have been issued by a justice of the peace, under the provisions of the Canada Temperance Act, and the defendant M. as his assistant.

The facts necessary to give jurisdiction did not appear either in the information or warrant, and the warrant was issued by one justice contrary to s. 108 of the Act.

Held, that the conviction was bad.

Held, also, that the constable being a trespasser, his assistant could not justify under him.

Nothing will be intended in favour of the jurisdiction of an inferior court.

BOHAKER v. MORSE.

Married Women's Property Act of 1884—Seizure of wife's property under attachment against the husband—Averment of performance of conditions precedent—"Wages or earnings"—Pleading.

A. J. B., a married woman, was owner of certain flats or water lots on the Annapolis river, at Granville, in the county of Annapolis, upon which a weir was erected for the taking of fish. The defendant, as sheriff of the county of Annapolis, levied upon a quantity of fish taken in the weir under a writ of attachment issued against the husband, J. B., who had been residing for several years in the United States, as an absent or absconding debtor. J. B. left the province for the United States in 1881. The property upon which the weir was erected was acquired by A. J. B. in 1882 or 1883, and the attachment was issued on the 23rd September, 1884, the Married Women's Property Act being then in force.

Held, per McDONALD, C.J., that the fish taken by the plaintiff, or by persons employed by her, was "earnings" within the meaning of R. S. c. 94, s. 52.

Held, also, that the statement of claim containing an allegation that the "said property was acquired by the said A. J. B., during coverture, otherwise than through her said husband, and belonged to her under and by virtue of the Married Women's Property Act of 1884, in her own right, and which she claimed to be entitled to under said Act," the defendant was bound to plead non-performance of the condition precedent requiring the filing in the registry of deeds of a consent in writing by the husband, if he wished to take advantage of it.

Per McDONALD, J., that the plaintiff's statement of claim implied an averment of the performance of the condition precedent necessary to maintain her case, and that the defendant must specify distinctly any condition, the performance of which he intended to contest.

Held, also, that the words "wages or earnings" covered

the result of the plaintiff's labour and industry as well as something acquired under a contract for services.

Per RITCHIE and WEATHERBE, JJ., that the plaintiff's statement of claim pointed distinctly to the third section of the Act, relating to the real and personal property of married women, and contained no reference to wages or earnings or anything to suggest that the property was claimed under s. 52, which protects a married woman's separate earnings with the husband's consent.

That if the plaintiff had brought herself within s. 52, she might have recovered, though an amendment would have been necessary.

That there is no distinction between fishing and any other business which might have been carried on on the land, the profits of which would not be exempt from seizure unless the conditions of s. 52 had been complied with.

KEATING v. ELLIS

Pleading—Tender and payment into court—Effect of acceptance of money by plaintiff—Costs.

To an action for freight alleged to be due for the carriage of goods, the defendant pleaded two pleas, the one alleging tender before action brought, and the other payment into Court in satisfaction of the plaintiff's claim.

The plaintiff having accepted the money paid into Court in full satisfaction of the claim in respect of which it was paid, in accordance with Order 22, Rule 6, the defendant contended that the plea of tender involved the costs of the action up to the time of payment into Court, and left an issue still outstanding which he was entitled to have tried, or to have the action dismissed with costs.

Held, that the acceptance of the money paid into Court in full satisfaction of the plaintiff's claim was a determination of the action, leaving the question of costs or tender to be disposed of by the Judge.

PINEO v. GAVAZA.

Bill of sale—Fraud against creditors—Decision of County Court Judge affirmed—Insolvent Act, 1875.

In an action of replevin against the assignees of one D. to recover certain goods claimed by the plaintiff under a bill of sale made more than thirty days before his insolvency, the Judge of the County Court found for the defendants on the ground that the bill of sale was given in contemplation of insolvency, and was an unjust preference, having the effect of injuring, obstructing, and delaying creditors.

The decision of the Judge being borne out by the circumstances attending the insolvency, and the relationship existing between the parties, and the Judge below having had the further advantage of hearing and seeing the witnesses, the Court refused to disturb the finding.

RITCHIE v. HALL.

Pleading—Amendment—Power of Court to order at any stage—Costs where amendment not applied for in Court below—Estoppel—Action for money had and received—Order 19, Rules 17 and 19; Order 28, Rule 1.

In an action for money had and received the defendant's pleas fell short of the explicitness required by Order 19, Rules 17 and 19, and would have been ground for the entry of judgment for the plaintiff on admissions in the pleadings. The Judge of the County Court, before whom the case was tried, having dismissed the action without costs, the plaintiff appealed. At the argument of the appeal an application was made on behalf of the defendant for leave to amend.

Held, that under Order 28, Rule 1, the Court has power to allow an amendment of the pleadings at any stage, for the purpose of determining the questions in controversy between the parties. But as the amendment, if applied for in the County Court, would have avoided the necessity of the appeal, it could only be allowed on payment of costs.

It was contended at the trial that the defendant had represented that the money sought to be recovered was in his possession, and that as the action was brought in consequence of this representation, and the plaintiff had suffered

prejudice, the defendant was estopped from setting up his defence.

Held, that the question of estoppel could not arise until the issue was settled between the parties by the amendment.

McDONALD v. CLARKE.

Pleading—Defences under Customs and Inland Revenue Acts—Construction of Order 19, Rule 2; Order 18, Rule 21; Order 12, Rule 19—Unnecessary prolixity a matter for taxation—General issue—Power of Court to order a statement in summary form, or issues to be prepared or settled.

To an action brought against the defendant, an auctioneer in the city of Halifax, to recover damages for the alleged wrongful sale of a horse, waggon, and harness, seized by officers of the Inland Revenue while being used for the purpose of removing a quantity of spirits unlawfully manufactured and liable to excise duties, the defendant pleaded twenty-nine grounds of defence, which were expanded at great length.

The Judge of the County Court for District No. 1, holding that, under the Customs Act, Acts of 1885 c. 12, s. 228, and the Inland Revenue Act of 1883 c. 14, s. 72, the defendant was bound to plead the general issue and give the general subject matter in evidence, and that the defences as pleaded were unnecessarily prolix, and were unnecessary and embarrassing, made an order directing that all the pleas be struck out with the exception of the fourth, which denied the allegations and issues in the plaintiff's statement of claim, and which he held to be equivalent to the general issue.

Held, that the order must be set aside with costs.

That the pleas, though expanded at great length, were not necessarily on that account embarrassing.

That, under the Judicature Rules, unnecessary length is a matter which can be effectually dealt with on taxation of costs, as provided by Order 19, Rule 2.

That it was doubtful whether the defendant, being merely the auctioneer who sold the goods, could avail himself of the protection given by the Acts to revenue officers, and that he was therefore entitled to raise every defence necessary to ensure his success.

That even if the defendant were held to be an officer entitled to the protection given by the Acts, he was not bound to plead the general issue; that being merely a privilege given to certain officers which they may or may not make use of.

That the Judge was wrong in holding the 4th ground of defence to be equivalent to the general issue, as it was not so pleaded, and did not comply with the requirements of Order 18, Rule 21, and would have been a violation of Order 21, Rule 19.

That some of the pleas struck out were good as containing distinct denials of material facts set out in the plaintiff's statement of claim, and essential to his case.

That others were good as asserting title in the defendant and in Her Majesty.

That others were good as justifying the defendant's action under the provisions of the Inland Revenue and the Customs Acts, all of the defences being such as the defendant was clearly entitled to make use of.

Semble, that the Judge of the County Court might have directed the substitution of a statement in a summary form of the material facts, or that the parties prepare issues or have them settled by the Judge.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q. B. D.] [3RD APRIL, 1888.

In re MACDOUGALL.

Solicitor, certificate to practise as—Uncertificated solicitor allowing his name to be used—R. S. O. c. 140.

Held, affirming the judgment of the Court below, 13 O. R. 204, BURTON, J.A., dissenting, that a duly admitted and enrolled solicitor, who does not take out his annual certificate as such, cannot allow his name to be used in legal proceedings as partner by a firm of practising solicitors, even though he does not derive any emolument therefrom, without rendering himself liable to the fines and penalties imposed by R. S. O. c. 140.

Shepley, for the appellant.

Reeve, Q.C., and *Walter Read*, for the respondents.

CH. D.] [6TH MARCH, 1888.

COYNE v. BRODDY.

Trustee and cestui que trust—Statute of Limitations.

In 1877 B., having become aware that the plaintiff held some promissory notes of one F., for whom R. was effecting a loan, suggested that the plaintiff should hand over the notes to him. as money was going through his hands for F., and that he would collect them and save the amount for herself and children. The plaintiff having acted on such suggestion, the money received by B. in that year was retained by him until 1886, when he became insolvent and made an assignment

under the Act to trustees, who in distributing the assets refused to recognize the plaintiff's claim, and pleaded the Statute of Limitations to an action brought to enforce payment.

Held, reversing the judgment of the Chancery Division, 13 O. R. 73, that the transaction was such as created the relation of trustee and *cestui que trust* between the plaintiff and B., and that the right to recover from B.'s estate was not barred by the lapse of time.

Bain, Q.C., for the appellant.

J. H. Macdonald, Q.C., for the respondent.

[13TH NOVEMBER, 1888.

In re SMART INFANTS.

Infants—Custody—Habeas corpus—Petition—Amendment—Con. Rule 444—Appeal—Waiver.

The order of the Chancery Divisional Court, 12 P. R. 435; 8 Occ. N. 118, affirmed on appeal.

Held, that the infants' father had waived his right to appeal from the order directing the filing of a petition, by having complied with such order.

Semble, but for the waiver, the appeal of the father must have succeeded; for the power given by Rule 474, Ontario Judicature Act (Con. Rule 444), is to amend any defects or errors, not to compel a litigant to adopt a different form of remedy for one which is in itself competent and regular.

S. H. Blake, Q.C., and *H. Cassels*, for the infants' mother.

J. Maclennan, Q.C., and *J. K. Kerr*, Q.C., for the father.

C. P. D.]

BETTS v. GRAND TRUNK R. W. CO.

Discovery—Production of documents—Railway accident—Report and evidence on investigation.

The decision of the Common Pleas Divisional Court, 12 P. R. 86, affirmed, substantially on the same grounds.

Lyell v. *Kennedy*, 27 Ch. D. 1. and *Kyshe* v. *Holt*, W. N. 1888, p. 108, referred to in addition to the cases cited in the judgment appealed from.

Osler, Q.C., for the appellants.

Robinson, Q.C., and *Shepley*, for the respondent.

C. C. MIDDLESEX.] [29TH JUNE, 1888.

McPHERSON v. WILSON.

Parol evidence—Fraud—Misrepresentation—Written agreement.

In an action for not delivering promissory notes for the price of a harvesting machine, as stipulated for in a writing signed by the defendant, the latter swore at the trial that he never agreed to give such notes, and that by the agreement verbally entered into by him with the plaintiff's agent no such stipulation was made, and that when the writing was read over by the agent no mention was made of such notes; and the defendant sought to call witnesses present at the bargain to prove these facts, but the Judge refused to permit such evidence to be given, as fraud was not set up as a defence; and also refused to allow an amendment setting up such defence, by reason of which judgment was entered against the defendant for $200, which the Judge in term refused to set aside.

On appeal, this Court, whilst expressing no opinion as to the effect the evidence, if given, ought to have with the jury, was of opinion that it ought to have been submitted to them, and if necessary for that purpose that an amendment should have been permitted at the trial, and allowed the appeal with costs, and ordered a new trial without costs.

G. W. Marsh, for the appellant.

T. Macbeth, for the respondent.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[ARMOUR, C.J., 1ST NOVEMBER, 1888.

PRICE v. GUINANE.

Landlord and tenant—Overholding Tenants' Act—Powers of County Judge—"Colour of right"—Writ of possession—Stay of proceedings.

The expression "colour of right" in the Overholding Tenants' Act, R. S. O. c. 144, means such semblance or appearance of right as shews that the right is really in dispute. The Act confers no authority upon the County Judge to try the question of the tenant's right or title; as soon as it is made to appear that the right is really in dispute, there is then that colour of right which the Act contemplates, and the Judge is bound to dismiss the case.

Gilbert v. *Doyle*, 24 C. P. 60, and *Woodbury* v. *Marshall*. 19 U. C. R. 597, not followed.

Upon the proceedings before the County Judge being commanded to be sent up, the High Court has power to stay proceedings upon the writ of possession under the Act.

Shepley, for the plaintiff.

Lash, Q.C., for the defendant.

[13TH NOVEMBER, 1888.

KEAN v. EDWARDS.

Award—Appeal from—Time—Trinity Term.

An award must be moved against within the term following its publication, or within the period which such term formerly occupied.

And where an award was published on the 13th August. 1888, notice of appeal dated 7th September, 1888, but not served till 10th September, was

Held, too late, and the appeal dismissed.

Lash, Q.C., and *Kean*, for the plaintiff.

Pepler, for the defendant.

[16TH NOVEMBER, 1888.

In re WELLER.

Married woman—Devise to—Restraint on alienation—R.S.O. c. 132, s. 8.

Certain lands were devised to W., a married woman, with the proviso that she should not alienate or incumber them until her sister should arrive at the age of forty, and the proviso that the devise should be for her separate use, independent of her husband's control.

W. applied under R.S.O. c. 132, s. 8, for an order to bind her interest, for her own benefit, in these lands.

Held, that the restraint against alienation was valid, and would have been so even if the applicant had been a *feme sole*.

Earls v. *McAlpine*, 27 Gr. 164; 6 A. R. 145; *Pennyman* v. *McGregor*, 18 C. P. 132; *Smith* v. *Faught*, 45 U. C. R. 484; *Re Winstanley*, 6 O. R. 315, followed in preference to *Rosher* v. *Rosher*, 26 Ch. D. 801.

Held, also, that the restraint on alienation was not a restraint on anticipation within the meaning of the statute.

R. S. Cassels, for the application, *ex parte*.

CHANCERY DIVISION.

[THE DIVISIONAL COURT, 7TH SEPTEMBER, 1888.

TRICE v. ROBINSON.

Personal representative—Letters of administration issued after action brought —R. S. O. c. 194, s. 122.

In an action under R. S. O. c. 194, s. 122, (which had to be brought within three months) by the administratrix of the deceased, it appeared that the accident from which the cause of action arose happened on the 1st June. The writ of summons was issued on the 31st August, but the letters of administration to the plaintiff were not issued until the 3rd September.

Held, that, by the old rule in Chancery proceedings, it was sufficient for the administrator to obtain letters of adminis-

tration before the case was heard, as they when obtained related back to the death, and that now by R. S. O. c. 44, s. 53, s-s. 12, the equitable doctrine, as opposed to that at law, must prevail, and that the plaintiff's letters of administration were issued in time.

T. H. A. Begue, for the appeal.

Moss, Q.C., contra.

[BOYD, C., 15TH OCTOBER, 1888.

In re HARVEY AND TOWN OF PARKDALE.

Damages—Measure of—Strips of land reserved by owner in laying out street —Expropriation by municipality — Arbitration—Notes of evidence— Appointment of arbitrator.

Two owners of adjoining blocks of land laid out streets through the centre thereof to within one foot of the boundary line between their respective blocks, each reserving one foot to himself, thus forming an obstruction to the street of two feet of land, and laid out and sold off their respective blocks in building lots.

Subsequently the council of the town in which the land was situate passed a by-law to expropriate these two feet as a local improvement, to be paid for by the owners of the property benefitted by the opening through of the street; and an arbitration was held under the by-law with one of the owners, and an award made fixing the value of his one foot at one dollar. On a motion to set aside this award,

Held, that it is only damages necessarily resulting from the exercise of the power of expropriation which can be taken into account under R. S. O. c. 184, s. 483.

Held, also, that the true rule is that when Parliament gives compulsory powers and provides that compensation shall be made to the person from whom the property is taken for the loss that he sustains, it is intended that he shall be compensated to the extent of his loss, and that his loss shall be tested by what was the value of the thing to him, not by what will be its value to the persons acquiring it.

Stebbing v. *Metropolitan Board of Works*, L. R. 6 Q. B. at p. 42, quoted with approval.

Held, also, following *Re Muskoka and Gravenhurst*, 6 O. R. at p. 357, that the objection that notes of evidence were not taken by the arbitrators and filed, as directed by s. 401 of the Act, was not irremediable.

Held, also, following *Re Eldon and Ferguson*, 6 U. C. L. J. 207, that the award should not be interfered with on the ground that the arbitrator was not appointed under seal, as that objection, if a valid one, could be taken by the appellants on any proceeding to enforce the award, if so advised.

Re Gifford and Bury Town Council, 20 Q. B. D. 368, and *Re Smith and Plympton*, 12 O. R. at p. 31, referred to and distinguished.

J. Maclennan, Q.C., for the appeal.

J. H. Macdonald, Q.C., contra.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 11TH SEPTEMBER, 1888.

BALL v. CATHCART.

Ejectment—Res judicata—Judgment by default of appearance—Divisional Court, powers of.

Since the Ontario Judicature Act, a judgment recovered in an action of ejectment by default of appearance will sustain a defence of *res judicata* to an action subsequently brought by the defendant to try the same question.

Cochrane v. *Hamilton Provident and Loan Society*, 15 O. R. 138, followed.

A Divisional Court has no power to hear an appeal direct from the Master in Chambers or a substantive motion to set aside a judgment by default of appearance.

Masten, for the plaintiff.

Aylesworth, for the defendant.

[ARMOUR, C.J., 2ND NOVEMBER, 1888.

WORMAN v. BRADY.

Costs—Jurisdiction of County Court—Title to land—Pleading.

The statement of claim alleged that the defendant was a monthly tenant of the plaintiff's land, and that the plaintiff on a certain day terminated the tenancy by notice, and claimed damages for injuries to the demised premises. The statement of defence denied the allegation that the plaintiff terminated the tenancy, etc.

Held, that the title was put in issue by such denial, and as a County Court would therefore have had no jurisdiction, the costs should be on the scale of the High Court, although the plaintiff recovered only $75.

Held, also, that the question whether the title was in issue must be determined according to the pleadings, and not according to what took place on the trial or reference.

D. C. Ross, for the plaintiff.

E. T. English, for the defendant.

IN CHAMBERS.

[GALT, C.J., 10TH NOVEMBER, 1888.

TORONTO AND HAMILTON NAVIGATION CO. v. SILCOX.

Jury notice—Action to rescind contract—R. S. O. c. 44, s. 77—Parties—Joint contractors.

The action was brought to rescind a contract for the sale of a vessel by the plaintiffs to the defendant, on the ground that the defendant had failed to perform his part of the contract, and for damages for breach of the contract and for injuries to the vessel, which had been delivered to the defendant, and to restrain the defendant from dealing with it, and for delivery up thereof.

Held, that this was an action over the subject of which, before the Administration of Justice Act, 1873, the Court of Chancery had exclusive jurisdiction, and a jury notice was therefore improper, under s. 77 of the Judicature Act, R. S. O. c. 44.

The defendant applied to add as a co-defendant one W., on whose behalf, as well as his own, he had made the contract in question, and who with knowledge of it had ratified and adopted it, but who was not formally a party to it.

Held, following *Kendall* v. *Hamilton*, 4 App. Cas. at p. 513 *et seq.*, that the defendant had no right to force W. upon the plaintiff as a defendant, in the character of a joint contractor.

Quære, whether W. would have a right to be brought in as a defendant on his own motion.

Shepley, for the plaintiffs.

Hoyles, for the defendant.

[ARMOUR, C.J., 2ND NOVEMBER, 1888.

GANANOQUE CARRIAGE CO. v. BINCETT.

Judgment debtor—Examination—Unsatisfactory answers.

A motion by the plaintiffs to commit the defendant for unsatisfactory answers upon his examination as a judgment debtor. The defendant admitted that he had lost money betting on horse races.

C. Millar, for the motion, contended that this shewed an unsatisfactory disposition of his assets, and was an unsatisfactory answer within the meaning of R. S. O. (1877) c. 50, s. 305; citing *Crooks* v. *Stroud*, 10 P. R. 131.

Henry, for the defendant, was not called on.

ARMOUR, C.J., said that he must decline to follow *Crooks* v. *Stroud*. The reasoning of that case did not commend itself to him. Any disposition of a debtor's assets other than payment of his debts would be unsatisfactory to the creditor. If the debtor gave his money to East African missions, or lost it in some legitimate business venture, it would be highly unsatisfactory to his creditors; and losing it in betting was not more so. As there was authority for the motion, there would be no costs.

Motion refused without costs.

THE MASTER IN CHAMBERS, 26TH OCTOBER, 1888.

MACARA v. SNOW.

Counter-claim—Issue—Close of pleadings—Notice of trial.

A counter-claim must be a defence in the action in which it is pleaded, and it is as much a part of the defence as any of the other pleas.

And therefore where the plaintiff took issue on the defence, not mentioning the counter-claim,

Held, that the pleadings were closed, and a notice of trial served thereafter was regular.

Douglas Armour, for the plaintiff.

Masten, for the defendant.

[31ST OCTOBER, 1888.

TENNANT v. MANHARD.

Partnership—Judgment against firm—Execution against alleged partner—Con. Rules 756, 876.

The plaintiffs recovered judgment against the defendants, a partnership firm, by default of appearance after service of the writ of summons upon M., a member of the firm, and then moved under Con. Rule 876 for leave to issue execution upon such judgment against D. as a member of the firm. D. disputed his liability, but upon his cross-examination upon an affidavit filed on the motion, such facts appeared as convinced the Master in Chambers that he was a general partner, and he made the order asked for. The Master

Held, that the admissions of D. in his cross-examination justified the order under Con. Rule 756, and avoided the necessity of sending an issue to be tried under Con Rule 876.

Held, also, that Con. Rule 756 was applicable at this stage of the cause, i.e., after judgment obtained without pleadings.

Shepley, for the plaintiffs.

E. T. English, for one Doddridge.

(But see *McLeod* v. *Sexsmith*, ante p. 394).

NEW BRUNSWICK.

In the Supreme Court.

In re CADBY.

Extradition—Treaty of Washington, 1842—Extradition Act, 1870—Canadian Extradition Act, 1877—Application to fugitives from United States—Jurisdiction to arrest fugitive criminals—Requisition to arrest—Statement of offence in warrant—Evidence of the crime—Depositions taken in foreign country—Authentication of—Discharge of prisoner on previous arrest—Subsequent arrest in another Province—Forgery in a foreign country.

By an order of the Queen in Council in December, 1882, the operation of the Extradition Act, 1870, was suspended in Canada, so far as related to a foreign state with which there was an extradition arrangement.

Held, that under this suspending order, the provisions of the Canadian Extradition Act, 1877, were made applicable to fugitive criminals from the United States, under the provisions of the Treaty of Washington, 1842.

Under the Extradition Act, 1877, a requisition from the United States Government is not necessary as a preliminary condition to the arrest and commitment of a person charged with an extraditable offence.

In order to give jurisdiction to issue a warrant to arrest a person under the Extradition Act, 1877, it is not necessary that the information should state that he was then within the Province.

It is sufficient to authorize a commitment for an extraditable offence, that the evidence would justify a commitment for trial if the offence had been committed in this Province.

A warrant of commitment under the Extradition Act, may state the crime generally—as "forgery"—according to the prescribed form; without setting forth the acts constituting the offence.

The Governor of a State in the United States of America is not a minister of a foreign state within s. 9 of the Extradition Act, so as to make depositions authenticated by him evidence in this Province.

Forgery of an instrument purporting to be a promissory note may be committed, whether the name signed to it is that of an existing or a fictitious person; provided the name is assumed for a fraudulent purpose.

A fugitive criminal arrested in Nova Scotia under an extradition warrant and improperly brought into this Province, while the proceedings were pending, by the officer having him in charge, was discharged from custody here by a Judge's order.

Held, that being out of the jurisdiction of Nova Scotia, he might afterwards be arrested here for the same offence; and that his arrest in this Province was not a violation of s. 6 of the Habeas Corpus Act, (31 Car. 2, c. 2).

In re CURRIE.

Prohibition—Methodist Church of Canada—Trial of minister for immorality —Omission to serve notice of trial—Appearance of accused—Jurisdiction —New trial—When charges must be tried.

By Dominion Act 47 V. c. 106, the several Methodist Churches in Canada were united, and incorporated under the name of "The Methodist Church," and the existing rules and discipline adopted and declared binding, and by Provincial Act 47 V. c. 22, such union was ratified and confirmed. The rules of discipline provided, among other matters, for the trial of ministers for certain offences. The 249th rule directed that when a charge was made against a minister, a committee of investigation consisting of not less than three ministers should be called to inquire into it; and rule 250 declared that if they deemed the charge proved, they should admonish or otherwise deal with the accused till the next Conference, when a committee of twelve ministers should be appointed to try the case, and also a committee of nine ministers as a Court of Appeal, to whom the accused, if not acquitted by the Court of trial, might refer the case.

A charge of immorality having been made against C., a minister, an investigating committee heard the matter in his absence in May, 1885, (he not having had notice of the meeting), and found him guilty, and so reported to the next annual Conference, who in June following appointed a Court of trial and a Court of Appeal to decide the matter. The Court of trial heard the case—C. being present and taking part in the proceedings—and found him guilty. He appealed from their decision, and at his request, and on his statement that he could obtain additional evidence, the Court of Appeal ordered a new trial.

In August following the President of the Conference for that year notified C. that for the purpose of the new trial he had appointed a committee to investigate the charge against him. This committee of nine ministers met in September —C. and his accuser being present. Evidence was heard on both sides, and the committee found the charges proved, and ordered that the sentence pronounced by the investigating committee in May should be continued till the next session of the General Conference in 1886.

Held, 1. KING, J., dissenting, that the rules of discipline having been incorporated in the statute, and made part of it, the tribunals appointed to try charges against ministers were constituted Courts, and were therefore under the control and supervision of this Court; and that a prohibition would lie to restrain the proceedings if they exceeded their jurisdiction.

2. TUCK, J., dissenting, that when the charge was made against C., the Conference acquired jurisdiction over the subject-matter; and when he appeared before the Court of trial and took part in the proceedings, it acquired jurisdiction over him, though he had not been served with notice of the meeting of the investigating committee.

3. TUCK, J., dissenting, that the new trial should have taken place before the Court which first tried the charges; and that the committee which met in September had no jurisdiction to re-hear the case; and that C.'s appearance before them and taking part in the proceedings did not give them jurisdiction.

Quære, whether after the new trial had been ordered, and while it was undisposed of, the proceedings could be abandoned, and a new charge made against C.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

McLELLAN v. MUNICIPALITY OF ASSINIBOIA.

Assessment and taxes—Execution of tax deed—Reeve and treasurer not agents of municipal corporation.

A statute authorizing the sale of land for taxes provided that the deeds "shall be executed by the reeve and treasurer, and under the seals of the municipalities respectively." In an action against a municipality for refusal to execute a deed;

Held, KILLAM, J., dissenting and affirming DUBUC, J., that the action would not lie, for the deed ought to be executed by the reeve and treasurer, and that not as agents of the municipality.

The declaration which was the subject of judgment in 5 Man. L. R. 127, having been amended in several respects, the defendants again demurred. DUBUC, J., allowed the demurrer, and the above judgment was given upon the defendants' appeal.

[KILLAM, J.

McNAUGHTON v. DOBSON.

Staying proceedings—Second action—Formal objection—Enlargement—Appearance.

An application to stay proceedings in a second action for the same cause cannot be made before appearance.

But such an objection is a "formal" one, and may be cured by enlargement of the application and the entry of appearance.

REGINA v. HOWES.

Indictment—Quashing—Identity with information.

The Court can entertain a motion to quash an indictment at any time.

An indictment, within R. S. C. c. 174, s. 140, need not follow the exact language of the information. That section does not prevent the finding of any indictment founded upon the facts disclosed in the depositions.

CANADIAN PACIFIC R. W. CO. v. NORTHERN PACIFIC AND MANITOBA R. W. CO.

Injunction—Fear of riot—Construction of statutes—Railway crossings—B. N. A. Act.

The fact that the plaintiff will by force oppose a threatened trespass, and so possibly cause bloodshed, is no reason why the Court should grant an interlocutory application, if the right is not clear.

The Act incorporating the N. P. and M. R. W. Co. does not of itself supersede the power given to the Railway Commissioner by 51 V. c. 5, with reference to the building of the extension of the R.R.V.R. to Portage la Prairie.

An *ex parte* injunction having been dissolved on the ground that the questions involved were of such difficulty that they should be decided at the hearing only, the bill was amended and a new *ex parte* injunction granted. Upon motion to continue it,

Held, that the plaintiffs were entitled to have a full consideration of all the questions involved; and a more deliberate argument having solved the difficulties, the injunction was continued.

The Dominion Parliament has power to provide that no Provincial railway shall cross a Dominion railway without making application to the Railway Committee of the Privy Council of Canada.

A statute provided that a certain thing should not be done until "without application to the Railway Committee for approval of the place and mode," etc.

Held, that the Act required that the approval be obtained and not merely applied for.

The Railway Commissioner for Manitoba is a "person": and may be enjoined from prosecuting the construction of a railway.

Attorney-General v. *Ryan*, 5 Man. L. R. 81, followed.

In re McPHILLIPS, AN ATTORNEY.

Attorney's undertaking—Summary jurisdiction to enforce—Sheriff.

An attorney having an execution in the sheriff's hands, and the sheriff requiring security before seizure, the attorney's partner wrote to the sheriff agreeing to indemnify him. The sheriff seized, was sued, and judgment went against him. Upon a summary application to enforce the undertaking;

Held, 1. That the undertaking was that of the writer personally.

2. That it was given in a professional capacity and might be summarily enforced.

3. But that the sheriff having acted improperly in the seizure, and so incurred a greater liability than that against which he was indemnified, he should be left to his action.

ONTARIO.

Supreme Court of Judicature.

COURT OF APPEAL.

Q.B.D.] [13TH NOVEMBER, 1888.

REDDICK v. SAUGEEN MUTUAL FIRE INSURANCE COMPANY.

Insurance — Fire — Statutory conditions — Additional conditions — Title — Physical risk—Moral risk.

The defendants in the prescribed manner indorsed upon the plaintiff's policy, as an addition to the first statutory condition, a condition providing that any fraudulent misrepresentation in the application, or any false or incorrect statement representing the title or ownership of the applicant, or the concealment of any mortgage or execution or any incumbrance on the property or on the land on which it was situate, should avoid the policy unless the directors in their discretion should see fit to waive the defect. In his application the plaintiff stated that the land on which the building proposed to be insured was situated was incumbered by a mortgage for $1,500, but omitted to disclose that it was also charged, together with other property, with a small annuity in favour of his father. The omission was not explained, but it was not attributed to any fraudulent intent.

The defendants pleaded that the non-disclosure of that charge avoided the policy under the first statutory condition or the above addition thereto.

The jury found that the existence of the annuity was not material to be made known to the defendants.

Held, affirming the judgment of the Court below, 14 O. R. 506: (1) That the non-disclosure of the annuity was the concealment of an incumbrance within the meaning of the

added condition. (2) That the added condition was not a just and reasonable one, because it was not limited to such facts or matters as were material to be made known to the company. (3) That the Divisional Court might determine whether the condition was a just and reasonable one, and that it was not necessary that it should first have been raised at the trial.

In the statutory declaration proving the claim under the policy the plaintiff said nothing of the annuity in favour of his father. The defendants failed to prove, and the jury were not asked to find, that the declaration was fraudulently false in this respect.

Held, no defence under the 15th statutory condition.

Mason v. *Andes*, 18 C. P. 19, followed.

Semble, the first statutory condition applies to matters of title or incumbrances, or concerning the "moral" as well as the "physical" risk, where the policy is based upon an application on which the insured is interrogated as to such matters.

Klein v. *Union Fire Insurance Co.*, 3 O. R. 234, approved and distinguished.

On the argument of the appeal the defendants for the first time set up that by the application the plaintiff had described the building insured as occupied by himself and his tenants as a dwelling house, thereby contracting with the defendants that it was so occupied; whereas, in fact, it was then vacant, and that there being thus an entire misdescription of the subject matter of the insurance, the risk never attached. On the pleadings and at the trial this misdescription was relied upon merely as being a material misdescription avoiding the policy under the first statutory condition. This issue was found in favour of the plaintiff, it being proved that the policy had been issued in substitution of a former policy in the defendant company, the risk on which they had continued after accepting notice that the building had become vacant, and that the application for the substituted policy had been filled up by their general manager, to whom the plaintiff had given all the information he asked, and had told him that the building was then unoccupied.

Held, that under the circumstances the knowledge of their general manager was the knowledge of the company; that

the misdescription was immaterial; and that the defendants could not be permitted at that stage of the cause to shift their ground, and set it up as a covenant.

McCarthy, Q.C., and *W. H. Kingston*, for the appellants.
Guthrie, Q.C., and *J. B. Clarke*, for the respondents.

CH. D.] [12TH SEPTEMBER, 1888.

WARNOCK v. KLOEPFER.

Insolvent debtor—Assignment of book debts—48 V. c. 26, s. 2.

Held, affirming the judgment of the Court below, 14 O. R. 288, that book debts are a species of property covered by s. 2 of 48 V. c. 26, and that any gift, conveyance, assignment, transfer, or delivery thereof by a debtor in insolvent circumstances is void; BURTON, J.A., dissenting.

G. W. Field, for the appellants.
Masson, Q.C., for the respondents.

FERGUSON, J.]

STUART v. GROUGH.

Attachment of debts—Equitable debt—Receiver—Payment by garnishee to attaching creditor after appointment of receiver.

The interest of a debtor in a trust estate, consisting of the right to a share of the proceeds of the sale of such estate when made by the trustees, is not attachable under Rule 370 (Con. Rule 935) relating to the attachment of debts. It is only a debt legally or equitably due or accruing due, that is to say, *debitum in præsenti, solvendum in futuro*, which is capable of attachment; moneys which may or may not become payable by a trustee to his *cestui que trust* are no debts.

The case of *Leeming* v. *Woon*, 7 A. R. 42, is not to be followed, being founded on *Re Cowans' Estate*, 18 Ch. D. 638, which is now overruled by *Webb* v. *Stenton*, 11 Q. B. D. 518.

Judgment of FERGUSON, J., 15 O. R. 66; 7 Occ. N. 429, reversed.

The proper course in a case like this is to obtain equitable execution against the debtor's interest by the appointment of a receiver. For this purpose it is now unnecessary that the creditor should issue writs of *fi. fa.* against goods or lands.

After an order to pay over had been made upon the garnishee summons, but before the property had been sold by the trustees, an order for a receiver had been obtained by another judgment creditor, under which a receiver was duly appointed, and notice thereof given to the garnishees (the trustees) and the attaching creditor. Notwithstanding this, the garnishees subsequently, without further compulsion or threat of execution, paid the money to the attaching creditor, without moving against the attaching order, and without notice to the receiver, or giving him an opportunity of doing so.

Held, that the equitable execution must prevail, and such payment did not discharge the garnishees. The effect of the order for a receiver was absolutely to preclude the judgment creditor from enforcing the order to pay over and the garnishees from disposing of the money when received by them (otherwise than by paying it to the receiver) without leave of the Court.

The duty of garnishees who have notice of circumstances affecting the right of the attaching creditor to enforce the order to pay over, pointed out.

Wood v. *Dunn*, L. R. 2 Q. B. 73, considered.

The effect of the appointment of a receiver upon the rights of an attaching creditor considered.

Hawkins v. *Gathercole*, 1 Drew. 12; *Ames* v. *Birkenhead Dock Co.*, 20 Beav. 332, acted on.

MacKelcan, Q.C., for the appellant.

Moss, Q.C., for the respondent.

STREET, J.] [13TH NOVEMBER, 1888.

In re OSTROM AND TOWNSHIP OF SIDNEY.

Municipal corporations—R. S. O. c. 184, s. 546—Notice of by-law to open road—Computation of time—Quashing by-law.

The Municipal Act, R. S. O. c. 184, s. 546, enacts that no council shall pass a by-law for establishing a public highway until written or printed notices of the intended by-law have been posted up one month previously in six of the most public places in the neighbourhood of such road, etc.

The defendants on the 29th of July, 1887, published notices of their intention to pass a by-law in the 29th of August, 1887, to open a road across nine lots in the first concession of the township. On that day the council met and passed a by-law establishing a road across four only of the lots mentioned in the notice. The date of putting up the notice was recited in the by-law, and was admitted by the affidavits filed by the defendants on shewing cause to the motion to quash the by-law.

Nothing had been done under the by-law.

Held, that the giving of the prescribed notice is a condition precedent to the right of the council to pass such a by-law; that the month is to be computed exclusive of the first and last day; and, therefore, that a notice on the 29th of July of an intention to pass a by-law on the 29th of August was insufficient.

Authorities as to computation of time in such a case considered.

Laplante v. *Peterborough*, 5 O. R. 634; *Wannamaker* v. *Green*, 10 O. R. 457, approved of.

Quære, whether the council could pass a by-law to open up or establish a road other than the road as described in the notice.

Baker v. *Saltfleet*, 31 U. C. R. 386, referred to.

Judgment of STREET, J., 15 O. R. 43; ante p. 113, reversed.

Aylesworth and *F. S. Wallbridge*, for the appellant.

W. H. P. Clement, for the respondents.

C. C. SIMCOE.]

PUBLIC SCHOOL TRUSTEES OF SECTION No. 9, NOTTAWASAGA v. TOWNSHIP OF NOTTAWASAGA.

Division Courts Act, R. S. O. c. 51, ss. 77, 78—Splitting cause of action—Abandoning excess—Res judicata—Public Schools Acts, 43 V. c. 32, s. 4; 48 V. c. 49, s. 126; R. S. O. c. 225, s. 117—Right of trustees to whole proceeds of rates levied for school purposes—Money had and received.

In each of the years 1881 to 1886 inclusive, the defendants levied a rate to raise the sums required by the plaintiffs for school purposes. The rate was imposed in good faith as being the nearest which could be struck in order to insure the collection of the sum demanded with the necessary expenses, but in each year a small surplus was produced by it, which the council refused to pay over to the trustees, contending that they were entitled to retain and apply it towards payment of any sum which might be demanded by the trustees in a future year, as in the case of an excess collected on account of a special municipal tax for a local object under s. 365 of the Municipal Act.

Held, affirming the judgment of the County Court, that this section did not apply; and that the money having been collected for school purposes, the council was required by the statute to pay it over to the trustees in each year. It was not intended by the Consolidated Public Schools Act of 1885, 48 V. c. 46; R. S. O. c. 125, to alter the law in this respect.

The difference between the powers of public school trustees and of the Roman Catholic separate school trustees to levy school rates by their own authority observed upon.

In 1887 the plaintiffs sued the council in the Division Court for the surplus rates received by them in 1881, and recovered judgment therefor. They afterwards brought this action in the County Court for the surplus received in the five subsequent years. The defendants contended that the claim was *res judicata* by reason of the judgment in the Division Court, and also that the plaintiffs were not entitled to recover, because by suing in the Division Court for the surplus of 1881 alone, they had divided their cause of action

into two or more suits, contrary to s. 77 of the Division Courts Act, R. S. O. c. 51.

Held, reversing the judgment of the County Court: (1) That the recovery in the Division Court, being for a wholly distinct and separate cause of action, and not upon a balance of account under s. 77, or after abandonment of the excess under Rule 7, was no defence to an action for the surplus rates received by the defendants in the subsequent years: (2) That if there had been a splitting of the cause of action within the meaning of the Act, by suing for the surplus of one year alone, the objection should have been taken as a defence, or by way of motion for prohibition, in the first suit, and could not be pleaded as a bar to this action.

Semble, that the several claims, being entirely distinct and unconnected, did not form "one cause of action" so as to come within the prohibition of s. 77 against dividing a cause of action.

Re Aykroyd, 1 Ex. 479, referred to.

The proper form of judgment in the Division Court, where the excess is abandoned or the action is for balance of an acccount, pointed out.

Aylesworth, for the appellants.
Strathy, Q.C., for the respondents.

IN CHAMBERS.

[MACLENNAN, J.A., 4TH DECEMBER, 1888.

CONMEE v. CANADIAN PACIFIC RAILWAY CO.

Courts—Judge of Court of Appeal, powers of—Enforcing agreement as to costs in Court of Appeal—Staying execution to be issued out of High Court.

A Judge of the Court of Appeal in Chambers has power to set aside any proceeding in that Court taken contrary to good faith, or to the agreement of the parties, or to stay proceedings so as to prevent such a thing being done when it is threatened.

But where the plaintiffs were threatening to issue execution out of the High Court (contrary to an alleged agreement) for costs awarded them by the Court of Appeal in respect of interlocutory appeals to that Court;

Held, that the defendants' motion to stay proceedings should be made in the High Court. The enforcement of an agreement would be more properly sought in a Court of original jurisdiction.

W. M. Douglas, for the plaintiffs.

S. H. Blake, Q.C., for the defendants.

High Court of Justice.

QUEEN'S BENCH DIVISION.

[THE DIVISIONAL COURT, 19TH NOVEMBER, 1888.

GRANT v. CORNOCK.

Breach of promise of marriage—Statute of Limitations—Successive promises—Independent contracts — Justification of breach — Use of obscene language by the plaintiff—Mitigation of damages—General reputation.

In an action for breach of promise of marriage the jury found that there was at first a mutual promise to marry in six months and a subsequent mutual promise to marry on the death of the defendant's father. The jury were also asked (Q. 3), "After the father's death in April, 1879, did the defendant, in response to a question by the plaintiff, say that all was left to his brother to share, and that until his brother shared with him he could not marry her?" To which they answered, "yes." The division of the father's estate did not take place till December, 1887.

Held, FALCONBRIDGE, J., dissenting, that the answer to the third question was a finding of a mutual promise to marry upon a division of the defendant's father's estate, and, as a breach of that promise did not take place until December, 1887, the cause of action arising thereupon was

not barred by the Statute of Limitations at the time the action was brought, in 1888. The several mutual promises were all independent contracts, the promise of the one party being the consideration for the promise of the other, so that each successive mutual promise became a new and independent contract, from the breach of which only the statute would begin to run.

Costello v. *Hunter*, 12 O. R. 331, distinguished.

Per FALCONBRIDGE, J., that the answer of the jury to the third question did not shew a new or substituted agreement, but an excuse for delay or a continuance of the original promise, and the case was therefore governed by *Costello* v. *Hunter*.

Held, also, FALCONBRIDGE, J., dissenting, that want of bodily chastity is the only misconduct which affords a justification in law for a breach of a promise to marry. It is no justification to shew that the woman has been heard to use obscene language; nor is such evidence admissible in mitigation of damages, although general evidence of reputation may perhaps be admissible.

Wallace Nesbitt and *W. M. Douglas*, for the plaintiff.
Shepley, for the defendant.

FINCH v. GILRAY.

Landlord and tenant—Payment of taxes by tenant—Rent—Real Property Limitation Act.

Where there is no contract between landlord and tenant as to payment of taxes on the demised premises, the landlord must pay them; and therefore payment of the taxes by the tenant must be regarded as part of the compensation which the landlord receives for the use of the land.

And where the tenant agreed to pay the taxes and six dollars monthly in addition, and did pay the taxes during the whole period of his possession but did not pay anything else from Christmas, 1867, until March, 1886;

Held, that the payment of taxes was equivalent to payment of part of the rent and prevented the running of the

statutory period of limitation prescribed by the Real Property Limitation Act.

Per STREET, J., dissenting, that the tax collector could not be treated as the agent of the landlord, and the payment of taxes was not sufficient to take the case out of the statute.

Wallace Nesbitt, for the plaintiff.

J. B. Clarke, for the defendant.

[6TH DECEMBER, 1888.

READ v. HUNTER.

Magistrate—Jurisdiction of—Warrant of apprehension—R. S. C. c. 178, s. 39—Affidavit of service of summons.

The jurisdiction of a magistrate to issue a warrant under R. S. C. c. 178, s. 39, for the apprehension of a person who does not appear in answer to a summons, does not depend upon an affidavit being made by the person who served the summons; it is sufficient that it shall appear to the satisfaction of the magistrate that the summons was served within a reasonable time.

The plaintiff was summoned before the defendant, a magistrate, to answer a complaint, but did not appear, and the defendant issued a warrant for his apprehension, under which the defendant was arrested, and brought this action for trespass.

It was tried at the Brantford Autumn Assizes, 1888, before MACMAHON, J., and a jury, and a verdict for the plaintiff was entered.

At the trial it appeared that the plaintiff had actually been served with the summons a reasonable time before the time appointed for appearance, but the constable who served the summons had not made oath as to the service before the defendant issued his warrant.

R. S. C. c. 178, s. 39, provides that "If, on the day and at the place appointed by the summons for hearing and determining the complaint or information, the defendant against whom the same has been made or laid does not appear when called, the constable or other person who served the defendant with the summons shall declare upon oath in what manner he served the summons; and if it appears to the satisfaction of the justice that such constable or other

person duly served the summons a reasonable time before the time appointed for appearance, such justice may * * issue his warrant," etc.

On the 6th December, 1888, *Mackenzie*, Q.C., for the defendant, moved to set aside the verdict and to dismiss the action on the ground that no trespass was committed, and on other grounds. He referred to *Howell* v. *Armour*, 7 O. R. 363; *Bross* v. *Huber*, 18 U. C. R. 282; *Ratt* v. *Parkinson*, 20 L. J. N. S. Mag. Ca. 208; *Norris* v. *Smith*, 10 A. & E. 188; *Bettersworth* v. *Hough*, 10 L. C. Jur. 184; and as to limitation of time to R. S. O. c. 73.

Wallace Nesbitt, for the plaintiff, conceded that the action was too late if R. S. O. c. 73 was applicable; but he argued that it was not applicable unless the defendant was acting as a justice of the peace; and if not so acting he was a mere trespasser. There was evidence of malice, and if a justice acts maliciously and makes an error, he is liable as a trespasser. Every part of the statute must be strictly followed; the defendant had no jurisdiction over the body of the plaintiff until the affidavit of service of the summons was made. He referred to *Connors* v. *Darling*, 23 U. C. R. 541; *Allen* v. *McQuarrie*, 44 U. C. R. at p. 68; *Morgan* v. *Palmer*, 2 B. & C. 729.

Judgment was delivered at the close of the argument.

ARMOUR, C.J.—It cannot be contended that the affidavit was necessary to found the defendant's jurisdiction. It appeared to his satisfaction that the summons was served within a reasonable time, and it is quite plain that he had a right to issue his warrant. His jurisdiction did not depend upon the affidavit, but upon the fact appearing.

FALCONBRIDGE and STREET, JJ., concurred.

Motion allowed and action dismissed with costs.

[STREET, J., 11TH DECEMBER, 1888.

WILGRESS v. CRAWFORD.

Foreclosure — Subsequent incumbrancer — Reference — Interlocutory order — Amending judgment.

There is no authority to make a reference by interlocutory order to a Master to add parties with the object of allowing them to redeem or having them foreclosed.

And where the plaintiff in a mortgage action obtained the usual foreclosure judgment and had his account taken thereby without a reference, and after final order of foreclosure discovered that a subsequent incumbrance existed, the judgment was amended under Con. Rules 780 and 781 so as to convert it into a judgment under Con. Rule 776, with a reference to the Master in Ordinary to add incumbrancers, take the accounts, etc.

H. T. Beck, for the plaintiff.

CHANCERY DIVISION.

[IN BANC, 22ND SEPTEMBER, 1888.

REGINA v. LOGAN.

Criminal law—Summary conviction—Gaming Houses Act, R. S. C. c. 158, s. 6—Distress for the penalty—R. S. C. c. 178, ss. 87, 88.

A summary conviction under the Gaming Houses Act, R. S. C. c. 158, s. 6, was quashed because it provided for *distress* in default of payment of the fine, distress not being mentioned in the section.

Held, that, as the extreme penalty for the offence was imposed, the irregularity in the conviction in the provision for distress was not cured by R. S. C. c. 178, ss. 87 and 88.

Regina v. *Sparham*, 8 O. R. 570, approved.

MeMichael, Q.C., and *Osler*, Q.C., for the defendant.

Badgerow and *Shepley*, for the complainant.

[BOYD, C., 6TH OCTOBER, 1888.

McLEOD v. AVERY.

Mortgage—Second mortgagee taking timber—Right of first mortgagee to make him account, on security proving insufficient to satisfy his claim.

The Court will not restrain a mortgagor in possession or anyone claiming under him at the suit of a mortgagee from cutting standing timber, unless it is proved that the acts complained of are likely to render the security scanty.

The defendant F., being a second mortgagee, entered into possession of the mortgaged premises and cut down and sold timber thereon. In an action by the first mortgagee to realize the amount due him, in which the lands were sold but did not realize enough to pay his claim;

Held, that a reference should be directed to ascertain the value of the timber sold by F., and that he must account therefor.

The remedy is not limited to a mere prevention of the mischief by way of injunction: if the security falls short of satisfying the first mortgagee's claim, he can pursue the other and make him account by way of damages for the injury done to the property.

Brown v. *Sage*, 11 Gr. 239, referred to.

C. J. Holman, for the plaintiff.

Moss, Q.C., contra.

[16TH OCTOBER AND 23RD NOVEMBER, 1888.

LONDON AND CANADIAN L. & A. CO. v. GRAHAM.

Sale of land—Specific performance of contract—Charter of loan company, construction of—Acquisition and retention of land—Forfeiture—Power to re-sell on default of purchaser—Release—Recital in conveyance to subsequent purchaser—Title, when shewn—Demand of abstract—Costs.

The plaintiffs, a loan company, who by the terms of their charter were bound "to sell any real estate acquired in satisfaction of any debt within five years after it shall have fallen to them," acquired certain land from a mortgagor by quit claim deed, dated 21st October, 1878, in which was contained a provision against the merger of the debt in the estate acquired. By agreement dated 23rd August, 1882, the plaintiffs sold to a purchaser, who went into possession, but failed to carry out the terms of his purchase. The plaintiffs resumed possession of the land, made a contract for sale of it to the defendant at a time more than five years after they had acquired the property, and brought this action to compel him to carry out his contract. The defendant objected to the title on the grounds that the plaintiffs had not sold within five years, and that a release from the first purchaser should be obtained and registered.

Held, that, giving the liberal construction against forfeiture which is a principle of statutory construction in cases like this, any *bona fide* sale was enough, though it fell short of conveyance, to prevent a forfeiture; and a sale not carried out, through default of the purchaser, was such a transaction as satisfied the statute.

Held, also, that power to re-sell is an implied term of any contract for the sale of land; and, the plaintiffs being at liberty by the terms of their contract to determine the agreement for default, it was competent to them to re-sell to the defendant, and there was no necessity to obtain a release from the first purchaser. As a matter of conveyancing, and for the purpose of registration, it was sufficient to recite in the conveyance to the defendant a sale within five years and the subsequent ending of the contract to sell, for non-performance by the purchaser.

Held, also, that shewing title is the manifestation on the abstract of all matters essential to a good title, and that, as the defendant had not demanded an abstract before action, he could not complain that title was first shown thereafter, and he was therefore ordered to pay the costs of the action.

Bridges v. *Longman*, 24 Beav. 27, followed.

Arnoldi, for the plaintiffs.

Hewson, for the defendant.

[22ND OCTOBER, 1888.

GOODERHAM v. TRADERS' BANK.

Mortgage—Redemption by puisne mortgagee—Assignment in place of discharge, a reconveyance—Form of assignment—R. S. O. c. 102, s. 2.

The defendants held a mortgage on certain lands of W. to secure his current account, which was also secured by commercial paper, much of which paper consisted of notes made by other customers for the accommodation of W.

The plaintiff had a mortgage on the same lands subsequent to the defendants', and made a tender to the defendants (who were threatening to sell the land under the power of sale in their mortgage) of what they claimed as

due to them, but also insisted on the execution at once by them of a simple assignment of the mortgage debt and mortgaged land to the plaintiff, with a covenant that the amount claimed was really due.

The defendants refused to accept the tender so made, and the plaintiff then moved for an interim injunction to restrain the defendants from dealing with their security until the trial of this action, in which the plaintiff sought an account of what was due the defendants, and, on payment, an assignment to him.

The motion was dismissed with costs, to be added to the claim of the defendants.

Held, that under R. S. O. c. 102, s. 2, the plaintiff was entitled to demand an assignment to himself if he wished, but he could not insist on the execution of the assignment tendered, as the defendants were entitled to have the assignment shew the precise character in which the plaintiff was paying the money, and also the notes in respect to which the defendants were claiming, and who were accommodation makers thereof, and the defendants were not bound to give a covenant as to what was due. The plaintiff, however, was entitled to an account and repayment of any excess.

T. P. Galt, for the plaintiff.

Lash, Q.C., and *Lefroy*, for the defendants.

[22ND NOVEMBER, 1888.

CHRISTIE v. HOWARTH.

Company—Liability of shareholders upon unpaid shares—Scire facias—Return of nulla bona against the company before action against shareholder—R. S. C. c. 119, s. 55.

A shareholder in a company is not liable to an action for unpaid stock by any creditor of the company until an execution at the suit of such creditor has been returned unsatisfied in whole or in part. Until the return of *nulla bona* in whole or in part, there is no right of action.

Held, also, that notwithstanding the plaintiff obtained a Judge's order, made *ex parte*, for the issue of a *scire facias*,

it could not avail against the express language of R. S. C. c. 119, s. 55.

The return of *nulla bona* is that act which fixes the shareholder's liability to be sued, and without that essential ingredient there is no right to resort to the Court.

Delamere and *E. T. English*, for the plaintiff.
Snelling, for the defendant Howarth.
J. M. Clark, for the defendant Mathers.

[28TH NOVEMBER, 1888.

KLINCK v. ONTARIO INDUSTRIAL LOAN AND INVESTMENT CO.

Mortgage—Power to distrain—Interest or rent—Distress after maturity without fixing new tenancy—Interest as damages—Rent more than six months overdue.

In the year 1881 A. made a mortgage to the defendants, maturing in 1886, in which was contained a proviso under the "short form" that the mortgagees might distrain for arrears of interest, and a special provision by which A. leased the lands until the maturity of the mortgage at a rental of the same amount as the interest. A. mortgaged his goods to B. in January, 1887. In August, 1888, the defendants distrained on these goods for rent or interest due in 1886, 1887, and 1888. In two actions for illegal distress brought by A. and B. respectively,

Held, on the evidence, that there was no definite tenancy after the maturity of the mortgage in 1886; that the interest after maturity was recoverable not by the terms of the contract but as damages; that a distress could not be made, as more than six months had elapsed after the expiry of the tenancy, and the rent becoming uncertain after the maturity of the mortgage required a new fixation, and therefore there was no right of distress.

Powell v. *Peck*, 15 A. R. 138, and *Bickle* v. *Beatty*, 17 U. C. R. 469, cited and followed.

George Moberley, for the plaintiffs.
McCarthy, Q.C., for the defendants.

[FERGUSON, J., 1ST NOVEMBER, 1888.

ARCHER v. SEVERN.

Costs out of estate—Interest upon from taxation.

Costs of all parties of an action for the construction of a will were ordered to be paid out of the estate of the testator and were taxed in 1883, but there were no funds available for their payment until 1888.

Held, that interest upon these costs could not be allowed out of the estate.

H. Cassels, for the executors.

Snelling, for the other parties interested.

[13TH NOVEMBER, 1888.

In re CHAMBLISS and CANADA LIFE ASSURANCE COMPANY.

Administrator ad litem—Con. Rule 311.

C. joined his wife in executing a mortgage on her land to a company, covenanting for payment, and then died intestate.

The company, being about to sell the land to realize their claim on the mortgage, desired to have C.'s estate represented for the purpose of claiming against it for any deficiency. No letters of administration having been taken out,

Held, that it was proper to appoint an administrator *ad litem* under Con. Rule 311.

Bruce, Q.C., for the company.

No one contra.

In re McDONALD AND NOXON BROTHERS MANUFACTURING COMPANY.

Company—Winding-up proceedings—"Contributory"—R. S. O. c. 183, s. 5.

A paid up shareholder in a company is such a "contributory," within the meaning of s. 5 of R. S. O. c. 183, as is entitled to initiate winding-up proceedings.

Hoyles, for the company.

W. Nesbitt, for the petitioning shareholder.

[28TH NOVEMBER, 1888.

In re MARA.

Vendor and purchaser—Evidence—Memorial of assignment of mortgage indorsed on mortgage—Discharge by assignee—Recital of assignment.

In an application under the Vendor and Purchaser Act, R. S. O. c. 112, in which a registered memorial of a deed poll or indorsement made on the back of a mortgage (describing the mortgage) *habendum* "to have and to hold the said mortgaged premises unto (assignee) his heirs and assigns, etc., subject to the provisos and conditions in said mortgage, which said deed poll or indorsement by way of assignment is witnessed, etc," was offered as evidence of the assignment.

Held, sufficient.

A discharge of mortgage executed by an assignee contained these words, "and that such mortgage has been assigned to me," instead of giving the particulars of the dates of and parties to the assignment, was also

Held, sufficient.

Frank Denton, for the vendor.

Coatsworth, for the purchaser.

[ROSE, J., 21ST NOVEMBER, 1888

McDONALD v. McDOUGALL

Vendor and purchaser—R. S. O. c. 112, s. 1—Memorial of will over twenty years old—Contents—Evidence—Life estate.

In an action for possession of land, the plaintiff claimed under a deed from John McD., dated 27th March, 1872. John McD. had been in possession for many years (more than 20) and died 27th September, 1881. The defendant claimed under a deed from Jas. McD., son of John McD., who claimed title under his grandfather's will, and offered in evidence a memorial of the will, dated 10th December, 1832, and registered the following day, containing the following statement: "He did also bequeath and give to Jas. McD., his grandson, the (describing the land) so as not to deprive his father during his lifetime."

Held, following *Gough* v. *McBride*, 10 C. P. 166, that the memorial could be received as evidence under R. S. O. c. 112, s. 1, and was good evidence of the devise, and that the plaintiff by his conveyance only obtained a life estate which ended when John McD. died, and he was not entitled to possession.

D. B. Maclennan, Q.C., and *J. W. Liddell*, for the plaintiff.

James Leitch and *R. A. Pringle*, for the defendant.

[ROBERTSON, J., 19TH OCTOBER, 1888.

NIHAN v. ST. CATHARINES AND NIAGARA CENTRAL R. W. CO.

Railways—Notice to expropriate—Notice of desistment—Bond—Ultra vires—Injunction.

On 13th June, 1887, the defendants, who were originally incorporated under an Ontario Act, gave notice of their intention to expropriate certain lands, and also executed a bond in a penal sum of $1800, which was duly allowed by the County Judge, and possession taken by the plaintiffs. Subsequently the Act 51 V. c. 78 (D.) was passed, bringing the railway under the legislative authority of the Dominion, and incorporating the provisions of the Dominion Railway Act, as to expropriation of lands, but ratifying all acts already done in that regard. On 22nd August, 1888, the arbitrators who had been appointed in the matter of the above lands to fix the compensation therefor, gave notice of intention to proceed with the arbitration, immediately after which the defendants gave notice of desistment, and then a new notice of intention to expropriate the same with other lands, and subsequently another notice specifying the original land only.

Held, that the notice of desistment served avoided the original bond, and the defendants must now give security by deposit of money in a bank instead of a bond, that being the mode of giving security under the Dominion Railway Acts, and unless they did so the plaintiff was entitled to an injunction restraining the defendants from using the land.

Where a railway company gave notice of their intention to expropriate certain lands, and the evidence shewed grounds

for supposing that the powers were to be exercised for other than those purposes which the railway laws of this country permit and allow:

Held, that they should be enjoined from proceeding with the expropriation.

S. H. Blake, Q.C., and *Collier*, for the plaintiffs.

Aylesworth and *Ingersoll*, for the defendants.

COMMON PLEAS DIVISION.

[THE DIVISIONAL COURT, 15TH SEPTEMBER, 1888.

BANK OF MONTREAL v. THOMAS.

Bill of exchange—Authority to draw—Enforcing contract to accept.

A bill of exchange for $225.76, drawn at Woodstock by the defendants, and accepted by F. at Brockville, fell due there on 2nd December, payable at the Molsons' Bank. On that day the defendants, being apprehensive that F. might not be able to pay the draft, telegraphed him that if he was unable to pay he was to draw on them for the same. F. took the telegram to the plaintiffs' manager, who discounted a sight draft drawn by F. on the defendants for the $225.76, and gave F. a cheque for the amount, with which he retired the draft due.

Held, that, under the circumstances, there was a clear equity in the Court to direct the defendants to accept the draft, and, as it was long past due, payment was ordered.

Britton, Q.C., for the plaintiffs.

G. T. Blackstock, for the defendants.

SCHUBRINCK v. CANADA ATLANTIC R. W. CO.

Railways—Accident—Negligence—Omission to ring bell or sound whistle—Highway.

In 1871 the owner of a block of land had a plan made and registered, laying out the land into lots with streets, etc. Most of the land, including that part marked on the plan as

O. street, was fenced in and used for pasturage and so continued until 1881, when a portion thereof, including O. street, no lots fronting thereon having been sold, was sold by the owner to the defendants, who treated the land as their private property, using it as a shunting yard. The plaintiff, a little boy, who lived with his father near by, was standing on the side of the track where it crossed O. street, as marked on the plan. He saw a train approaching; and when it came opposite where he was, it gave a jerk which frightened the plaintiff, and he slipped down the bank and was run over by the train and injured. No whistle was sounded or bell rung.

Held, that the omission to sound the whistle or ring the bell did not impose any liability on the defendants, as it in no way contributed to the accident.

Held, also, that O. street, as marked on the plan, was not a highway within the meaning of the Railway Act.

Robinson, Q.C., for the plaintiff.

McCarthy, Q.C., for the defendants.

TEMPERANCE COLONIZATION SOCIETY v. FAIRFIELD.

Contract—Misrepresentations—Rescission and recovery back of money paid—Statute of Frauds.

Where one party to a contract, relying on the misrepresentations made by the other party thereto, is induced to enter therein, he is entitled to have the contract rescinded and to recover back money paid by him thereunder.

The plaintiffs, a company formed for the purpose of colonizing lands in the North-west Territories, represented to the defendant by means of an advertisement, issued in a daily paper, that the Dominion Government had agreed to the selection by the company of a "compact, choice tract of land" in the territories, comprising 2,000,000 acres, for the purposes of settlement, with such provisions as would keep the settlement free from the use of intoxicating liquors. The defendant, on the faith of these representations, desiring to send his son to a place where he would be precluded from

the use of intoxicating liquors, entered into two agreements with the company, agreeing in each "to purchase and pay for 320 acres of land, in the order of choice from the odd numbered sections of our lands, as procured or to be procured from the Dominion;" and paid certain instalments thereon. It was proved that the company never had and could not obtain the choice, compact tract stated, nor any special privileges as to the exclusion of liquors.

Held, that these were material misrepresentations, and the defendant was therefore entitled to have the contract rescinded and to recover back the money paid by him.

Per GALT, C.J.—The contract was void under the Statute of Frauds, as when it was made the plaintiffs had no lands, and there was nothing in the contract to shew what lands the defendant was entitled to, or the plaintiffs were bound to convey.

McCarthy, Q.C., and *A. H. Marsh*, for the plaintiffs.

J. J. Maclaren and *McClive*, for the defendant.

ROBERTSON v. HOLLAND.

Insolvent debtor—Preference—Disposal of property by preferred creditor—Right of other creditors to set aside preference.

A favoured creditor, with the connivance of an insolvent debtor, procured a third person to purchase the debtor's entire stock in trade, for which the purchaser gave his note to the debtor, who immediately indorsed it to the favoured creditor. The latter discounted it at a bank. In an action by the other creditors to compel the preferred creditor to share ratably with them,

Held, reversing the judgment of GALT, C.J., that, as the preferred creditor had disposed of the note, no relief could be given.

E. D. Armour, for the plaintiffs.

J. J. Maclaren, for the defendants.

[STREET, J., 11TH DECEMBER, 1888.

TRUST & LOAN COMPANY v. GORSLINE.

Receiver by way of equitable execution—Attachment of debts—Salary not yet due.

Judgment creditors on the 7th December, 1888, moved for a receiver by way of equitable execution to receive money which they alleged would be due to the judgment debtor on the 21st December, 1888, for salary as a school-master. The application was refused.

Held, that if the debt was one which could be garnished, the judgment creditor should attach it; if it could not be garnished, it was because there was no debt at all.

Kincaid v. *Kincaid*, 12 P. R. 462, distinguished.

A. H. Marsh, for the judgment creditors.

No one for the judgment debtor.

In re PECK AND TOWNSHIP OF AMELIASBURGH.

By-law—Procedure on motion to quash—Notice of motion—Time.

The proceeding by rule *nisi* to quash a by-law is no longer in force, and the proceeding by motion is substituted for it; but s. 332 of the Municipal Act, R. S. O. c. 184, which requires four days' notice of an application to quash, is still in force; and the notice of motion given in this case, being only a two days' notice, was held insufficient.

A. H. Marsh, for the applicant.

No one for the Township.

IN CHAMBERS.

[ARMOUR, C.J., 22ND NOVEMBER, 1888.

In re YOUNG v. PARKER & CO.

Prohibition—Division Court—Judgment summons—Partnership—R. S. O. c. 51, s. 108, s-ss. 4, 5, 6.

After judgment obtained against the firm of P. & Co. in a Division Court, upon service of summons on M. P., who was in fact the only member of the firm, an after-judgment sum-

mons was issued and served on R. P. The Division Court Judge determined that R. P. had made himself liable as a partner by holding himself out as such, and was bound by the judgment, and liable to be examined as a judgment debtor.

Held, on motion for prohibition, that s-ss. 4, 5, and 6, of s. 108 of the Division Courts Act, R. S. O. c. 51, are applicable only to persons who are in truth partners; and prohibition was ordered.

Munster v. *Railton*, 10 Q. B. D. 475; 11 Q. B. D. 435; 10 App. Cas. 680, referred to.

Lennox, for the motion.

A. H. Marsh, contra.

[STREET, J., 30TH NOVEMBER, 1888.

MICHAEL v. BINGHAM.

Appeal—New evidence on—Con. Rule 585.

An appeal by the plaintiff from an order of the Master in Chambers refusing leave to sign judgment under Con. Rule 739.

The action was upon a dishonoured cheque, and the plaintiff in making out his case before the Master did not shew that the cheque was presented for payment and payment refused. Upon this ground the Master refused the motion.

Ritchie, Q.C., for the plaintiff, on the return of the notice of appeal, asked leave, under Con. Rule 585, to file an affidavit to shew presentment and refusal.

Morson, for the defendant, opposed this, urging that the question on appeal was whether the Master was right or wrong, and that question ought manifestly to be determined only on the evidence used before him.

STREET, J., gave leave to file the affidavit under the provisions of the rule cited, and also granted an enlargement to allow the defendant to answer it, intimating that the plaintiff would have to pay the costs of the appeal.

[4TH DECEMBER, 1888.

In re CHATHAM HARVESTER CO. v. CAMPBELL.

Arrest—Judgment debtor—Order for examination—Appointment—Failure to attend—Committal—Substituted service of summons—Writ of attachment—Notice to debtor.

An order was made by a Judge of the High Court, upon the return of a *habeas corpus*, for the discharge of the defendant from custody under a writ of attachment issued by order of a County Judge in an action in a County Court.

Held: (1.) That an order to examine the defendant as a judgment debtor and an appointment under it together were equivalent to an order that the debtor should attend upon the day mentioned in the appointment, and when he obeyed the order by attending and offering to be examined, its force was spent and the power of the examiner under it at an end; to obtain a fresh appointment, a fresh order was necessary.

Jarvis v. *Jones*, 4 P. R. 341; *McGregor* v. *Small*, 5 P. R. 56, referred to.

(2.) *Quære*, whether an order for substituted service of a summons to commit could be made in any case.

Anon., W. N. 1876, p. 105; *Hope* v. *Carnegie*, L. R. 7 Eq. at p. 260, referred to.

(3.) The order asked for by the summons, viz., for the committal of the defendant to the common gaol was the appropriate punishment authorized by R. S. O. (1877) c. 50, s. 305, for disobedience to an order to attend for examination; and an order for the issue of a writ of attachment requiring the sheriff to hold the debtor in custody for an indefinite period was improper. At any rate a different order from that indicated in the summons should not have been made in the absence of the debtor.

(4.) The writ of attachment under which the debtor was held was improperly issued without notice to him, as required by Con. Rule 879; and it made no difference that it was in lieu of one which had expired.

E. Douglas Armour, for the plaintiffs.

Aylesworth, for the defendant.

[11TH DECEMBER, 1888.

In re DICKSON INFANTS.

Infants—Habeas corpus—Right of father to custody—Age of infants—Habits of parents—Religious belief—R. S. O. c. 137, s. 1.

Upon an application by the father of two infants, under the ages of 5 and 3 respectively, for a *habeas corpus* to obtain their custody from the mother, it appeared that the applicant was a man of drunken habits and of evil conversation, that he had beaten his wife and so ill treated her that she was justified in leaving him, while she was a moral and sober woman. It was also shewn that the maternal grandmother of the infants was able and willing to give them a home with their mother, who lived with her, while the paternal grandmother was neither able nor willing to do so.

Held, that, having regard to the welfare of the infants and the conduct of the parents, the mother should have the custody for the present.

It was urged that the father had a right to have the children brought up Presbyterians, and that the mother and her mother were both members of the Salvation Army.

Held, that this question was not a pressing one owing to the tender age of the infants; the father might raise it again.

Held, also, that having regard to the wide discretion given by R. S. O. c. 137, s. 1, the Judge was freed from any possible obligation to make, upon the application of the father, an order which would be reversed on the application of the mother.

F. E. Hodgins, for the father.

W. H. P. Clement, for the mother.

BURKE v. PITMAN.

Indemnity—Relief against co-defendants—Procedure where such relief claimed—Trial of questions raised.

No order is necessary to enable a defendant to plead a claim for indemnity against his co-defendant, but such a claim will not be tried without an order providing for the determination of the question so raised.

P. borrowed money from the plaintiff and then went into partnership with N.; P. and N. afterwards sold the business to B. The plaintiff, having judgment against P., brought this action against P., N., and B. to set aside the sale to B. as fraudulent. P. alleged in his defence that N. agreed to pay half his debts, including that to the plaintiff, and that B. agreed to pay the liabilities of P. and N. appearing on their books, which the liability to the plaintiff did, and he claimed indemnity against N. and B.

Held, that the trial of the question whether or not the sale to B. was fraudulent as against the plaintiff would involve an inquiry as to the terms upon which B. purchased from the other defendants, and that the whole matter was one that might be advantageously disposed of at one hearing.

George Macdonald, for the plaintiff.
George Ritchie, for the defendant P.
Gunther, for the defendants N. and B.

[MacMahon, J., 11th December, 1888.

REGINA v. REMON.

Criminal law—House of ill-fame—Inmate—Satisfactory account of herself—R. S. C. c. 157, s. 8, s-s. (j)

Upon a charge against an inmate of a house of ill-fame under s-s. (j) of s. 8 of R. S. C. c. 157, it is not necessary to shew that the accused was called upon to account for her presence in the house before arrest: the concluding words of the sub-section, "not giving a satisfactory account of themselves," are to be read as applying only to frequenters, and not to keepers or inmates.

Regina v. *Leveque*, 30 U. C. R. 509, distinguished.
Aylesworth, for the defendant.
J. R. Cartwright, for the Crown.

[THE MASTER IN CHAMBERS, 17TH NOVEMBER, 1888.

IRWIN v. BROWN.

Counter-claim—Defence—Reply—Jurisdiction of Court—Foreign defendant—Assets in jurisdiction—Con. Rule 271.

A counter-claiming defendant is not a plaintiff in an action; nor is a counter-claim an action.

The defence of the plaintiff to a counter-claim is technically the plaintiff's reply, notwithstanding Con. Rule 379, and there can, without leave, be no further pleading by the defendant but a joinder of issue.

To a counter-claim against the plaintiff, who lived out of Ontario, seeking the recovery of a debt contracted out of Ontario, the plaintiff pleaded that the Court had no jurisdiction, and the defendant replied, without obtaining leave, that the plaintiff had assets in Ontario to the value of $200.

Held, that this reply, even if leave were obtained, was bad, because s-s. (*e*) of Rule 45, O. J. A., has not been incorporated in the Consolidated Rules. See Con. Rule 271.

W. M. Douglas, for the plaintiff.

Douglas Armour, for the defendant.

NOVA SCOTIA

In the Supreme Court.

In re BISHOP DYKE.

Municipal corporations—Dyke rate—Damages how valued—Costs of unsuccessful action not allowed in rate—Certiorari.

A dyke rate assessed by the commissioner included, besides the legitimate expenses, three sums, (1) for damages to land of one of the owners valued by assessors appointed by the owners, instead of being agreed upon or valued by free-

holders, as provided in s. 20 of c. 40, R. S.; (2) Costs incurred by the commissioner in bringing an unsuccessful action for dyke rates against one of the proprietors; (3) Commissions on the whole sum, including the above items.

Held, that items 1 and 2 could not be allowed, and that their disallowance involved a reduction of item 3; that therefore the rate must be quashed with costs.

Held, further, that the objection that the writ of *certiorari* was too late was not available at the present stage of the proceedings, but should have been taken on a substantive motion to quash the writ.

In re ROBINSON.

Undue influence—Testamentary capacity.

Decree of the Judge of Probate setting aside a will, on the grounds of undue influence and want of testamentary capacity, reversed.

McALLISTER v. CUSHING.

Appeal—Dismissal where appellant does not appear—Power of Court to restore to paper—Counsel unavoidably absent.

Where an appeal was dismissed because no counsel appeared to support it, the Court allowed the case to be restored to the paper in the following term, on an affidavit that the appellant's counsel had been prevented from attending by dangerous illness in his family.

NOWLIN v. THE MAYOR, ETC., OF ST. JOHN.

Landlord and tenant—Property seized under execution for taxes—Liability of party seizing to pay a year's rent—Consol. Statutes c. 83, ss. 8, 11.

Property seized under an execution for taxes against a tenant is liable to the landlord for a year's rent under ss. 8 and 11 of c. 83 of the Consol. Statutes.

REGINA v. RICE.

Certiorari—Application for, to single judge and afterwards to Court—Discretion—Appeal—One fine against two persons.

The defendants E. R. and H. R., his wife, were jointly convicted of having wantonly, cruelly, and unnecessarily beaten, ill-used, and abused a pair of oxen, the property of J. W. D., and for such offence were adjudged to pay a fine of $20 with $22.46 for costs, and, in default, to be imprisoned, etc.

The matter came before the Court on appeal from the refusal of a Judge to allow a writ of *certiorari*, but a preliminary objection having been taken to the appeal in such a case, an application was made to the full Court for a *certiorari* on the same grounds and affidavits.

Held, *per* McDONALD, C.J., and TOWNSHEND, J., that it was open to the defendants to make such an application.

Held, also, that the offence of which the defendants were convicted was one which was single in its nature, and for which only one penalty could be awarded, but that the award of one fine against the two defendants was erroneous, and, on this ground, that the *certiorari* should issue.

Per McDONALD, J., that the order of the single Judge could not be got rid of except by way of appeal, the law constituting a single Judge, in such cases, a tribunal with original jurisdiction equal to that of the full Court.

Held, also, that the allowance or disallowance of the *certiorari* was entirely a matter within the discretion of the Court or Judge applied to, and, such discretion having been exercised, the Court would not be justified in reversing his order.

Per RITCHIE, J., that the application to the full Court should not be entertained unless it were shown that the right of appeal had been lost.

Held, also, that the allowance or disallowance of the writ was a matter of discretion from which there was no appeal.

ARNOLD v. DIGGDON.

Damages—Injuries caused by a vicious animal—Scienter—Evidence—County Court Judge, finding of—Interference with.

In an action to recover damages for injuries inflicted upon a mare owned by the plaintiff by the defendant's bull, which

resulted in its death, the evidence to connect the bull with the injuries inflicted upon the mare was that it was running at large in the neighbourhood, and was of a vicious disposition, and shortly after the mare was injured had blood on one of its horns.

There was also evidence that the defendant had prior knowledge of the character of the bull.

The Judge of the County Court before whom the case was tried having given judgment for the plaintiff for the amount claimed, the Court refused to disturb his finding.

McDONALD v. McKENZIE.

Award—Entry of judgment upon—Costs.

The plaintiff had a claim against the defendant for counsel fees, which was submitted to an arbitrator, who made an award in the plaintiff's favour for $184, on which judgment was entered. Subsequently an agreement was entered into reciting a judgment for $184, without any reference to costs, and the matter was submitted to a second arbitrator, who awarded the plaintiff the sum of $104 "in full of all claims and demands of either party against the other."

The plaintiff having entered judgment for the amount so awarded with $79.80 costs of the original suit, and $24.60 for interest,

The Court refused to set the judgment aside.

WALLACE v. KING.

Certiorari—Set aside for defect in bail—How affected by right of appeal, or want of jurisdiction to inquire into facts anew—Order for, must show facts necessary to give jurisdiction—Imperial Act 13 Geo. II—Applicability to this Province.

A writ of *certiorari* was issued on bail taken, not as prescribed by the statute "to respond the judgment," but upon a condition forbidden by the statute, viz., that the rendering of the body should exonerate the bail.

Held, that the writ ought not to have been issued.

Held, further, that the writ should not have been allowed, as there was a right of appeal existing in the Court below,

of which the defendant had not availed himself, or accounted for his failure to do so, and also as the summary jurisdiction of the Supreme Court had been taken away so that the facts could not be inquired into anew, or the case satisfactorily disposed of.

Held, also, that the order allowing the *certiorari* was bad, as not showing on the face of it the facts necessary to give jurisdiction to the commissioner by whom it was granted, and that the objection was sufficiently taken in the notice of motion to set aside the writ when it stated that the order for the writ did not "show on the face of it that the commissioner who granted the same had jurisdiction to grant the same."

Quære, whether the Imperial Act 13 Geo. II. c. 18 applies to this province.

Regina v. *McFadden*, 7 R. & G. 426, reviewed.

McDONALD v. McKENZIE.

Short notice of motion—Appeal from order sustained because of.

Appeal from an order setting aside a replevin order. The notice of motion for the order setting aside the replevin order, was served at half-past six on Friday for the following Tuesday, the rules requiring two clear days' notice, not including the day of service or the intervening Sunday.

The appeal was sustained: Order 60, Rules 2 and 7; Order 52, Rule 5.

NEW BRUNSWICK.

In the Supreme Court.

CADBY v. STEWART.

Security for costs—Foreign domicile—Plaintiff taken from Province under extradition proceedings.

A British subject domiciled in the United States, coming to this Province and commencing an action, will not be required to give security for costs if he is afterwards arrested for a crime and taken to the United States under the Extradition Treaty; ALLEN, C.J., and TUCK, J., dissenting.

BREWER v. HUMBLE.

Negligence—Onus of proof—Where plaintiff's evidence leaves matter in doubt—Damage from sparks from steam mill—Where mill erected under agreement with plaintiff.

In an action against the owner of a steam mill for negligently destroying the plaintiff's property by fire caused by sparks from the mill, it is a proper direction to the jury that the plaintiff must prove to their satisfaction, beyond a reasonable doubt, that the defendant was guilty of negligence; and if the evidence left the matter in doubt, the defendant was entitled to the benefit of the doubt; WETMORE, J., dissenting.

Where the defendant erected his mill under a lease from the plaintiff, and covenanted to keep the mill in operation, he was not liable for injury to the plaintiff's property caused by sparks from the mill unless he was guilty of negligence either in the construction of the mill or in the manner of working it; WETMORE, J., dissenting.

The question of negligence with respect to fire caused by burning refuse near the mill, is governed by different principles from those applicable to a fire caused by sparks from a chimney.

MANITOBA.

In the Queen's Bench.

[FULL COURT.

ELLIOTT v. WILSON.

Jury fee—No fresh fee on new trial—Jury notice

The defendant gave notice for a jury and paid the jury fee. A verdict was found in his favour, but a new trial was directed. The plaintiff gave notice of trial again, but the prothonotary refused to enter the record until a further jury fee was paid. The plaintiff then moved to strike out the

jury notice, and after argument such an order was made with costs by BAIN, J.; but upon appeal the order was set aside, upon the ground that a second payment could not have been exacted.

[TAYLOR, C.J.,

SCOTT v. GRIFFIN.

Costs—Taxation—Accountant in Master's office—Attendance there of parties or experts.

The Master has power to direct the appointment of an accountant and to tax the payment of his fee.

Although the general rule is that nothing can be taxed for the preparation of accounts directed to be brought into the Master's office, yet in a partnership case, where it was not the duty of either party to prepare them, a disbursement for their preparation was allowed.

No allowance, beyond ordinary witness fees, can be made for the attendance in the Master's office during the passing of accounts, of a person specially familiar with them; nor to a party to the cause so attending.

MOLSONS' BANK v. ROBERTSON.

Special jury—Order for—Time for application.

An application for a special jury may be made in Chambers, but is more proper before the Assize Judge.

It is not necessary to give any reason for requiring a special jury; the application is of right.

A plaintiff may obtain an order for a special jury *ex parte*. A defendant should move upon summons, but not necessarily before entry of the record.

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NOTE:—Where a page only is mentioned, the reference is to the CANADIAN LAW TIMES Occasional Notes for 1888.

C. L. T.—*Canadian Law Times.*
Occ. N.—*Canadian Law Times Occasional Notes.*
S. C. R.—*Supreme Court (of Canada) Reports.*
A. R.—*Ontario Appeal Reports.*
O. R.—*Ontario Reports.*
P. R.—*Ontario Practice Reports.*
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